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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

COUNTY OF LOS ANGELES,

Petitioner,

vs.

CHARLES L. JORDAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Did the Ninth Circuit erroneously interpret and apply this Court's decision in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) to find a "live" case or controversy?

2. Can a named plaintiff who settles his individual claim after denial of class certification, consistent with Article III, appeal from an adverse ruling on class certification?

   (a) Can such a plaintiff, consistent with Article III, preserve his interest in any remedy which may accrue to the putative class, should such class be ultimately certified and prevail on the merits despite the voluntary settlement of all individual claims?

   (b) If such an interest can be preserved, is it sufficient to confer standing under Article III?

3. Assuming *arguendo* standing consistent with Article III, does the respondent meet the requirements of Rule 23, Federal Rules of Civil Procedure?

(a) Does respondent meet the requirement of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members"?

(b) Has numerosity in terms of the impracticability of joinder been sufficiently shown?

(c) Is respondent an adequate representative in terms of the typicality of his individual claim, as well as defenses thereto, the adequacy of counsel, and the issues of law in common with the class?

(d) Was the class sought to be certified properly defined?

4. Is a Court of Appeals bound by the "abuse of discretion" standard in reviewing a district court denial of class certification based upon the district court's factual determination that the named plaintiff failed to meet the specific prerequisites required for class certification?

(a) Did the Ninth Circuit erroneously apply the "impermissible legal criteria" standard instead of the "abuse of discretion" standard in reversing the district court's denial of class certification?

(b) Did the Ninth Circuit err in failing to remand the determination of class certification to the district court *if* the district court applied impermissible legal criteria?

TABLE OF CONTENTS

Page

Questions Presented i

Opinion Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

Reasons for Granting the Petition 8

I.

The Ninth Circuit's Finding of a "Live" Case of Controversy Is an Unwarranted Expansion of This Court's Decision in Geraghty 8

II.

The Finding of the Ninth Circuit That Respondent Retained a Personal Stake in the Class Certification Issue Is Contrary to This Court's Decisions in Geraghty and Roper 12

III.

The Apparent Tension Between Geraghty and Roper Should Be Resolved at This Opportunity 16

IV.

The Ninth Circuit Has So Expanded the "Broad Remedial Purpose" Doctrine as to Render the Prerequisites of Rule 23 Meaningless, Contra This Court's Decision in East Texas 18

V.

Contrary to This Court's Decision in Pullman-Standard v. Swint, the Ninth Circuit Failed to Apply the Abuse of Discretion Standard and Failed to Remand to the District Court to Apply Correct Legal Criteria 20

Conclusion 23

INDEX TO APPENDICES

Page

Appendix A. Opinion of the Court of Appeals ..... App. p. 1

Schroeder, Circuit Judge, Concurring in Part and Dissenting in Part 22

Appendix B. Reporter's Transcript of Proceedings; Los Angeles, California; Tuesday, May 30, 1978 .. 26

Appendix C. Stipulation to Entry of Final Judgment Re Individual Claims of Charles L. Jordan 37

Appendix D. Plaintiff's Motion for Reconsideration of Order Dismissing Appeal; Declarations of Charles L. Jordan and Walter Cochran-Bond; Memorandum of Points and Authorities; Proposed Order 40

Appendix E. Brief of Defendant/Appellee; Declaration 43

Appendix F. Motion for Leave to Add Parties; Declarations of Walter Cochran-Bond, James Keys, Jr., Tony L. Clarke and Samuel Abrons; Memorandum of Points and Authorities; Proposed Order 46

TABLE OF AUTHORITIES

Cases	Page
Deposit Guarantee National Bank v. Roper, 445 U.S. 326 (1980) 6, 8, 10, 11, 12, 13, 14, 15, 16,	17
Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977)	19
East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) ..... ii, 8, 18, 19,	20
EEOC v. General Telephone Co. of Northwest, 599 F.2d 322 (9th Cir. 1979)	19
Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977)	18
Hill v. Western Electric Co., 596 F.2d 99 (4th Cir. 1979)	19
McLaughlin v. Hoffman, 547 F.2d 918 (5th Cir. 1977) 15,	16
Pullman-Standard v. Swint; United Steel Workers of America, AFL-CIO, et al. v. Swint, ___ U.S. ___, 50 L.W. 4425 (1982) 8, 20, 21, 22,	23
Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978)	19
Sosna v. Iowa, 419 U.S. 393 (1975)	11
Spangler v. Pasadena City Board of Education, 552 F.2d 1326 (9th Cir. 1977)	9
United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) .... i, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17,	18
Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977) 5, 11,	12
Walker v. World Tire Corp., 563 F.2d 918 (8th Cir. 1977)	19
Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030 (5th Cir. 1981) 8, 11, 12, 17, 19,	21

Constitution	Page
United States Constitution, Art. III	i, 5, 8, 10, 14, 15, 16
United States Constitution, Art. III, Sec. 2, Clause 1	1, 2

Rules	
Federal Rules of Civil Procedure, Rule 17(1)(c)	1
Federal Rules of Civil Procedure, Rule 23	ii, 4, 18, 19, 20, 22
Federal Rules of Civil Procedure, Rule 23(a)	18, 19
Federal Rules of Civil Procedure, Rule 52(a)	21

Statutes	
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 28, Sec. 1343(3)	2
United States Code, Title 28, Sec. 1343(4)	2
United States Code, Title 42, Sec. 1981	2, 19
United States Code, Title 42, Sec. 2000e et seq.	2

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Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit (including dissent/concurrence), filed February 24, 1982, for the review of which petitioner seeks the issuance of a writ of certiorari, is reported at 669 F.2d 1311. It is reproduced in Appendix A, pp. 1-25.

Jurisdiction.

The opinion and judgment were entered on February 24, 1982. No rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Rule 17(1)(c).

Constitutional Provision Involved.

Article III, section 2, clause 1 of the Constitution states:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties made, or which shall be made, under their Authority, — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States and between a State, or the Citizens thereof, and/or States, Citizens or Subjects."

Statement of the Case.

In June of 1976, respondent, Charles L. Jordan, a black male, filed an action against petitioner, the County of Los Angeles, alleging that it had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. Section 1981, by withholding him from appointment to the position of custodian in September, 1973 based upon his juvenile record. Federal jurisdiction was premised upon the foregoing statutes and 28 U.S.C. Section 1343(3) and (4). Respondent pled a class action, claiming that disqualification based upon juvenile records disproportionately impacted upon blacks.

In September, 1976, respondent amended his complaint and additionally alleged that disqualification based upon his arrest record and his conviction for a marijuana-related offense also violated Title VII and Section 1981. Each claim was pled as a class action.

In filing its answer to the amended complaint, petitioner denied all allegations of discrimination and affirmatively alleged the following:

1. That petitioner does not have a general policy for all job-classifications on marijuana-related convictions; that petitioner had specific standards for employment to specific classes and departments based upon the nature of the department and the assignment;

2. That respondent was withheld for conduct not compatible with employment for the specific position of custodian, whether or not such conduct amounts to a crime, and that respondent would not have been withheld on the basis of his criminal convictions;

3. That respondent was withheld due to his failure to demonstrate a stable pattern of conduct necessary to be employed as a custodian in that he had been fired from his previous job and that the negative employment history of respondent was sufficient in itself to withhold him from employment.

Subsequently, respondent filed his initial motion for class certification. The district court denied the motion for lack of a sufficient factual showing to support certification. Several months later respondent filed the motion for class certification which is the subject of this petition. (One previous motion was withdrawn by respondent before it was heard by the district court.) That motion was supported only by a declaration of respondent's attorney, primarily addressing the question of his adequacy as counsel, and a Stipulation of Facts Relevant to the Existence of a Class which established the numbers of persons withheld by petitioner since 1973 whose records indicated the existence of one or more of the challenged criminal records. The Stipulation did *not* indicate that any of the criminal records were the basis for a withhold, what positions were involved, whether blacks were among those withheld, or the basis of withhold.

The district court denied the foregoing motion in its Order of July 27, 1978, referring to the opinion read in open court on May 30, 1978 for failure to make an adequate factual showing that Rule 23 prerequisites were met (See, Appendix B, pp. 26-36). Noting that this was the third motion for class certification, the district court found that the effort of respondent's counsel to create a class could cause neglect of respondent's individual case and ordered respondent's counsel to prepare for pretrial of the individual case forthwith.

After several unsuccessful attempts at submitting an acceptable pretrial conference order, respondent filed a Stipulation to Entry of Final Judgment re Individual Claims of Charles L. Jordan, drafted by respondent's counsel (See, Appendix C, pp. 37-39). The material provisions of the Stipulation were:

1. An acknowledgement that subsequent to the denial of plaintiff's last motion for class certification, "the case thereafter has proceeded as an individual action on behalf of Plaintiff Jordan";

2. The settlement of respondent's individual claims would in no way affect class action aspects of the lawsuit in that it "is not to be taken as any admission by defendant that the class action claims have any merit or that Plaintiff Jordan is a proper representative of the class." (It should be noted that the quoted part of the foregoing was excluded from the opinion below which interpreted the settlement agreement as concluding less than all of respondent's individual claims);

3. That upon payment of the sum of five hundred dollars ($500), respondent would "release and fully discharge Defendant County for any damage, liability, claim or remedy for the acts relating solely to him as an individual."

No agreement was made that petitioner conceded the existence of standing in respondent to pursue an appeal of any issue litigated prior to the subject stipulation or that petitioner would waive any jurisdictional challenge to any attempt by respondent to appeal any such previously litigated issue.

Subsequent to the foregoing Stipulation a Final Judgment re Individual Claims of Charles L. Jordan and Order was filed. The material provision of the judgment was that respondent shall not pursue his individual claim against petitioner and that petitioner is released and fully discharged from any liability arising from acts relating solely to respondent under the amended complaint.

Shortly thereafter, respondent received the agreed to sum and signed a release of all claims arising from the withhold from custodian in September, 1973 (See, Appendix D, pp. 40-42). In signing the release, respondent agreed to "forthwith abandon the prosecution of all causes of action growing out of the incident described in paragraph 1 (withhold of January 19, 1973) sued upon or suable upon in any court, . . ." Prior to the signing of the release respondent had filed a notice of appeal to the Ninth Circuit.

Petitioner moved to dismiss the appeal on the grounds that respondent's settlement rendered his individual claims moot and deprived the Ninth Circuit of jurisdiction to address the appeal due to the absence of a case or controversy under Article III. Relying upon its decision in *Vun Cannon v. Breed*, 565 F.2d 1096 (Ninth Cir. 1977), petitioner's motion was granted and the appeal was dismissed.

Subsequent to the entry of the foregoing order of dismissal, respondent submitted a motion for reconsideration. More than a year after the entry of final judgment (January 15, 1979) and more than five months after the dismissal of

the appeal for mootness (November 16, 1979), respondent filed with the Ninth Circuit a motion to add parties (April 19, 1980).

Prior to the filing of the motion to add parties the Ninth Circuit granted respondent's motion for reconsideration, assertedly in light of this Court's decision in *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326 (1980), and, it must be assumed, this Court's decision in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), reinstating the appeal and requiring the address, *inter alia*, of the questions of whether or not the appeal presents a justiciable case or controversy despite the settlement agreement between petitioner and respondent, or whether the settlement agreement precludes respondent from challenging the District Court's denial of class certification and whether or not the District Court abused its discretion or applied impermissible legal criteria or made clearly erroneous findings of fact in denying respondent's motion for class certification.

Subsequent to the reinstatement of the appeal, the policies and procedures for evaluating criminal records were totally revised (See, Appendix E, pp. 43-45). The facts relevant to the revision of the procedures and their material provisions are:

1. A comprehensive procedural manual for a new background checking program was developed after December 12, 1978;

2. Under current procedures only specific positions in specific organizational units are subject to review in terms of withholding otherwise qualified applicants for employment due to criminal record. Not all County Departments and/or organizational units are included and the majority of positions are not reviewed;

3. The positions reviewed do not include every position for which criminal records were reviewed in the past;

4. Individual standards for employment for positions reviewed, which determine what types of criminal offender information is relevant to the position in question, had been developed since the implementation of the current procedures and are not the same as those under previous procedures;

5. Under current procedures no criminal record is *per se* disqualifying unless so stated in applicable law (*e.g.*, State law requires all law enforcement officers to be free of felony convictions);

6. Under current procedures arrests without conviction are not considered disqualifying for *any* position.

On February, 24, 1982, the Ninth Circuit filed its opinion which found the existence of a "live" case or controversy and that respondent possessed a legally cognizable interest in the outcome. The opinion also reversed denial of class certification on the basis that the district court applied impermissible legal criteria and, without remand to district court in order that the appropriate legal criteria could be applied, certified the class.

REASONS FOR GRANTING THE PETITION.

The reasons for granting the petition are:

1. The issues raised in the first and second questions presented are of fundamental importance and have not been but should be settled by this Court. Resolution of these issues will also provide this Court an opportunity to lay to rest the apparent tension which exists between its decisions in the cases of *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) and *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326 (1980), as well as harmonize prior conflicting decisions addressing Article III mootness in the context of class actions.

2. The decision of the Ninth Circuit appears to be in conflict with applicable decisions of this Court, to wit: *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) and its progeny and *Pullman-Standard v. Swint; United Steel Workers of America, AFL-CIO, et al. v. Swint*, ___ U.S. ___, 50 L.W. 4425 (April 27, 1982).

3. The decision of the Ninth Circuit appears to be in conflict with that of the Fifth Circuit in *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030 (Fifth Cir. 1981), as to the application of the mootness doctrine after *Geraghty* and *Roper*.

I.

The Ninth Circuit's Finding of a "Live" Case or Controversy Is an Unwarranted Expansion of This Court's Decision in *Geraghty*.

The determination of the Ninth Circuit in finding the existence of a "live" case or controversy is based upon a superficial application of this Court's careful limitation of the scope of *Geraghty* to its particular circumstances. This Court found a "live" controversy to exist over the validity of the procedures challenged by the named plaintiff despite

the mootness of his individual claim because there were unnamed members of the putative class who were *presently* affected by the *same* procedures. The present effect of the procedures was adequately demonstrated by the fact that individuals so affected were, throughout the litigation, attempting to be substituted for named plaintiff or to intervene (see fn. 1, 445 U.S. at 390-391). There was no evidence that the procedures changed at any time.

By contrast, no such present effect of the procedures which allegedly denied respondent employment can be shown. The reliance of the Ninth Circuit upon the attempts of three purported members of the putative class to intervene as party plaintiffs as an adequate showing of such present effect is wholly misplaced. Those attempts were clearly untimely, both in terms of any independent action which they might seek to bring based upon the individual injury allegedly suffered and in terms of their qualifying as intervenors (See, *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326 [Ninth Circuit 1977]; *United Airlines Inc. v. McDonald*, 432 U.S. 385 [1977]). None of the purported intervenors alleged a claim based upon any denial of employment after 1974 (See, Appendix F, pp. 46-51).

Furthermore, there is undisputed evidence in the record that the procedures currently in effect are substantially different from those which had been in effect when respondent and purported intervenors were allegedly denied employment based on challenged criminal records (See, Appendix E, pp. 43-45). It is undisputed that neither respondent nor the purported intervenors have been negatively affected by the revised procedures. In fact, there is absolutely no evidence in the record to indicate that anyone has been denied

employment based upon the consideration of the criminal records in question under the current procedure.[1]

The Ninth Circuit completely misunderstood petitioner's contentions in re the revised procedures in stating that petitioner contends that they exclude any impermissible consideration of the challenged criminal records. The Ninth Circuit also reveals a questionable understanding of Article III jurisdictional requirements by stating that the issue of the job-relatedness of the challenged criminal records remains to be decided absent even an allegation that they have been considered in the denial of employment to anyone under the current procedures. Whether or not the current procedures have been sufficiently revised so as to exclude any impermissible consideration of arrest or conviction records and whether or not consideration of such criminal records can be shown to be job-related, it is clear that neither respondent nor the purported intervenors can raise those issues since they can show no present harm therefrom. The clear absence of such injury precludes any determination that a "live" controversy presently exists.

There is apparent conflict between the Ninth Circuit interpretation and application of the mootness doctrine after this Court's decisions in *Geraghty* and *Roper* and that of the Fifth Circuit. The Ninth Circuit reinstated respondent's appeal which it had previously dismissed as moot on the basis

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[1]It should be noted that subsequent to the withhold of the respondent and the purported intervenors, State law precluded the obtaining of criminal offender information by petitioner with the exception of such information for applicants for law enforcement positions, who are not members of the class. The prohibition went into effect January, 1975 and remained in effect until the implementation of the new procedure on December 12, 1978. The new procedures were reviewed by the Department of Justice of the State of California and determined to meet the provisions of the California Penal Code which allowed the petitioner to obtain such criminal offender information under limited circumstances (See, Appendix E, pp. 43-45).

of its decision in *Vun Cannon v. Breed* due to this Court's decisions in *Geraghty* and *Roper*. Such reinstatement would not have occurred in the Fifth Circuit.

In the *Zeidman* case, *supra*, the Fifth Circuit determined what *Geraghty* acknowledges, that mootness occurs unless the requisite personal interest which must exist at the commencement of a lawsuit continues to exist at every stage thereafter. In *Zeidman* the Court found that the named plaintiffs had the requisite personal stake in the outcome of a "live" case or controversy per *Geraghty* after a tender sufficient to fully satisfy their personal claims had been made by defendant pending the determination of a class certification motion. Nevertheless, in determining whether mootness had occurred, the Court referred to *Sosna v. Iowa*, 419 U.S. 393 (1975), rather than *Geraghty* or *Roper*, in terms of the principle of continuing standing:

> "We recognize, as did the district court, that a suit brought as a class action must as a general rule be dismissed for mootness when the personal claims of the named plaintiffs are satisfied and no class has properly been certified." 651 F.2d at 1045.

The only exception to the foregoing general rule was a situation in *Sosna* where *extrinsic* mootness occurs before the district court has had a reasonable opportunity to rule on the motion. 651 F.2d at 1045. The reason for the exception is that justiciable claims may be made by unnamed members of the putative class at some later stage of litigation as well as named plaintiffs whose individual claims may become moot due to extrinsic events.

> "Still, however, the class that takes the place of named plaintiffs for Article III purposes must ordinarily do so while the named plaintiffs have justiciable claims; the Court's holding in *Sosna* does not contemplate the maintenance of a lawsuit that otherwise would be dis-

missed for mootness, solely for the purpose of establishing a class of unnamed plaintiffs with justiciable claims." 651 F.2d at 1046.

If the rule of the Fifth Circuit had been applied to respondent's appeal by the Ninth Circuit, even after this Court's decisions in *Geraghty* and *Roper*, *Vun Cannon* would have still applied and respondent's appeal would not have been reinstated. None of the essential elements exists here to preclude mootness under the *Sosna* exception as interpreted by *Zeidman*: *i.e.*, the district court had more than sufficient time to decide the class certification question;[2] mootness was not caused by extrinsic circumstances or any act of petitioner but, rather, the voluntary settlement of all individual claims of named plaintiff for immediate monetary satisfaction; no certification occurred prior to expiration of the named plaintiff's claims; and there is no showing that the challenged criminal records are currently being considered by petitioner to deny employment to respondent or any unnamed member of the putative class. Where there is no showing of the recurrence of the expired claim, even *Geraghty* requires prior certification of the class (445 U.S. at 398).

II.

The Finding of the Ninth Circuit That Respondent Retained a Personal Stake in the Class Certification Issue Is Contrary to This Court's Decisions in *Geraghty* and *Roper*.

The holding of this Court in *Geraghty* specifically excepted from its decision "a named plaintiff who settles his individual claim after denial of class certification" (445

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[2]In fact, respondent was given three opportunities by the district court to make a sufficient showing to warrant certification of the class (See, Appendix B, p. 35).

U.S. at 404) as one without a sufficient personal stake in the outcome to warrant a finding that Article III standing exists to pursue an appeal from denial of class certification. By reference to this Court's decision in *Roper* the Ninth Circuit concedes that such named plaintiff would also lack standing under the circumstances of that case (See, footnote 4, 669 F.2d at 1317). Therefore, the settlement of respondent's individual claim precludes further appeal of the denial of class certification, even if the case had not otherwise become moot.

In order to avoid the consequences of this clearly applicable exception to standing in *Geraghty* and *Roper*, the Ninth Circuit majority finds that respondent did not conclude all his individual claims on the grounds that (1) he reserved his relationship to the class, and (2) that by so doing he retained a personal stake in the potential injunctive relief to which the class might be entitled *if* it is certified and *if* it prevails on the merits.

Reference to the settlement agreement and release in their entirety, rather than to a single clause from each taken out of context, reveals that respondent did settle his individual claims and that, thereafter, his interests were severed from those of the class (See, discussion in Statement of the Case).

The plain language of the settlement agreement indicates that respondent's interest was completely severed from those of the class at the time the settlement was entered into. The only reservation made was in terms of the unnamed members of the putative class to pursue an appeal. Whatever right the putative class had to raise such an appeal had to exist separate and apart from any right possessed by the named plaintiff to pursue such an appeal. Nevertheless the Ninth Circuit majority relied upon language of the settlement agreement taken out of context to somehow create standing

in the respondent to continue as the class representative even after the severance of his interests from those of the class.

The dissent to the opinion below not only agrees with petitioner's contention that respondent has not retained a personal stake sufficient to confer standing but, also, that there is no question but that respondent abandoned his personal claims altogether in favor of immediate monetary satisfaction. The dissent further pointed out the unpalatable result of the majority's reasoning, as well as the questionable qualification of such plaintiff to represent the interests of the class in the face of abandonment of his only legitimate personal claim. 669 F.2d at 1324-1325.

Even if respondent were deemed to have retained a personal stake in the outcome of class certification in terms of benefiting from potential injunctive relief to the class, such interest should be deemed insufficient under Article III and beyond the scope of either *Geraghty* or *Roper*. Any such benefit from class injunctive relief can in no way be considered a claim which respondent can assert as an individual. Since the Ninth Circuit concedes that such is the only claim which existed in respondent after the settlement, it must follow that the Ninth Circuit is essentially acknowledging that plaintiff's standing depends upon the class' standing. However, the class must have a representative, even one with only a lingering representative capacity after mootness of his personal claim per *Geraghty*, in order to have standing. The circular nature of the rationale of the majority opinion should be obvious and demonstrates the fallacy in their determination that a named plaintiff's standing can be premised upon the "standing" of a putative class, yet uncertified, when the standing of the uncertified class, in turn, depends upon the standing of the named plaintiff.

Ignoring for the moment the issue of whether or not the Ninth Circuit erroneously found a "live" controversy to

exist, it is clear that whatever future harm might be suffered by respondent would not necessarily be precluded by injunctive relief to the class. In the first place, new procedures have been implemented which are distinct from the only procedures the class could challenge. Moreover, respondent would not necessarily benefit from injunctive relief which abolished the consideration in any way of the criminal records in question to disqualify an otherwise qualified applicant if plaintiff could be withheld from employment for a reason independent of his criminal record; *i.e.*, his unacceptable prior work history.

The speculative nature of potential injunctive relief to the class would be insufficient to sustain a finding of the requisite personal interest to preclude mootness under Article III (See, Justice Powell's dissent in *Roper*, where he found even the continuing economic interest of the named plaintiffs in class certification to be too speculative to "sustain the jurisdiction of an Article III Court under established and controlling precedents." 445 U.S. at 345). In that regard, the objective fact of standing or its absence controls over the subjective intent of respondent extrapolated from the equivocal language of a settlement agreement after the fact.[3]

Had respondent gone on to litigate his individual claim on the merits and prevailed as did the plaintiff in *McLaughlin v. Hoffman*, 547 F.2d 918 (Fifth Cir. 1977), he would have become an employee. Once he became an employee it would be clear that he could no longer benefit from any injunctive

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[3]It should be emphasized that the dissent in the Ninth Circuit found no question as to whether or not all of respondent's personal claims were concluded by the settlement. ". . . it appears to me that this appellant, who voluntarily settled his personal claims *in toto*, is in a far weaker position to provide such representation than was the appellant in *Geraghty*, whose claims had been mooted by circumstances beyond his control." 669 F.2d at 1325.

relief to the class of future applicants. This entirely different result underscores the distinction between a named plaintiff who settles his individual claims and one who proceeds to final judgment on the merits until precluded by extrinsic mootness as a significant one which cannot be vitiated by the convenient argument that such plaintiff somehow retains an interest in a purely speculative class remedy.

III.

The Apparent Tension Between *Geraghty* and *Roper* Should Be Resolved at This Opportunity.

Whether or not respondent falls within the exception to *Geraghty* and *Roper*, this Court should establish standards to determine what interest, if any, remains after settlement of individual claims by named plaintiff and if such interest is sufficient to satisfy the standing requirements of Article III. By so doing this Court can resolve the apparent tension which currently exists between the two decisions.

The tension between *Geraghty* and *Roper* and the effect of the former upon the latter as well as upon the entire debate about the scope of Article III jurisdiction and the need to harmonize apparently conflicting decisions is succinctly and effectively stated by Justice Rehnquist in his concurring opinion to *Roper*:

> "I write briefly to state what seems to me to be sufficient differences between this case and *United States Parole Commission v. Geraghty* post, 388, 100 S.Ct. 1202, 63 L.Ed.2d 479, to allow the appeal of the denial of class certification in this case, and to dismiss the attempted appeal of the same question in *Geraghty* as moot. If I were writing on a clean slate, I might well resolve both these cases against the respondents, but the Court today has not cleaned the slate or

been successful in formulating any sound principles to replace what seem to me to be the muddled and inconsistent ones of the past." 445 U.S. at 340, 341.

The Fifth Circuit recognized this tension and characterized it as "serious" in *Zeidman*:

> ". . . Although both cases find justiciable an appeal from the denial of class certification by a named plaintiff whose individual claim had become moot, the two cases rest on very different theories: *Roper* looks to the named plaintiffs' cognizable economic interest in the certification, while *Geraghty* looks to whether the case is presented in a form capable of judicial resolution . . . The Court had the opportunity to decide *Roper* on the basis of *Geraghty*, but did not do so; instead, the Court rested its decision on the plaintiffs' assertion of an economic interest in class certification. Despite the fact that *Geraghty* is mentioned or discussed in each of the four concurring and dissenting opinions in *Roper*, and despite its obvious relevance, *Geraghty* is not so much as *mentioned* even a single time in the Court's majority opinion in *Roper*." 651 F.2d at 1043-1044.

Geraghty may not be mentioned by name in the majority opinion in *Roper*, but the statement in the principal holding in *Roper*, distinguishing its rationale from one based upon a concept of lingering representative capacity, is clearly a reference to the rationale in *Geraghty*:

> "We conclude that on this record the District Court's Entry of Judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' *individual* interest in litigation — as distinguished from whatever may be their representative responsibilities to the putative

class[12] — is sufficient to permit their appeal of the adverse certification ruling.

"[12]Difficult questions arise as to what, if any, are the named plaintiff's responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions." 445 U.S. at 340.

IV.

The Ninth Circuit Has So Expanded the "Broad Remedial Purpose" Doctrine as to Render the Prerequisites of Rule 23 Meaningless, *Contra* This Court's Decision in *East Texas*.

In its decision at page 1318, the Ninth Circuit quotes certain language from *East Texas* to the effect that discrimination suits are often by their nature class suits and that common questions of law or fact are typically present. However, the Ninth Circuit chooses to ignore the language which immediately follows that statement:

> ". . . But careful attention to the requirements of Federal Rule Civil Procedure 23 remains indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." 431 U.S. at 406-407.

Prior to its reference to *East Texas* the Ninth Circuit cited its decision in *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330 (Ninth Cir. 1977) for the proposition that the prerequisites of Rule 23(a) should not undermine the broad remedial purpose of Title VII and civil rights suits in general. However, *Gay* was decided prior to this Court's decision in *East Texas* and must be interpreted in light of *East Texas*.

By contrast with the Ninth Circuit's application of the "broad remedial purpose" doctrine, the courts of other cir-

cuits have not hesitated to deny certification of classes in Title VII and/or Section 1981 actions for failure to meet Rule 23(a) prerequisites (See, *e.g.*, *Walker v. World Tire Corp.*, 563 F.2d 918, 921 [Eighth Cir. 1977]; *Satterwhite v. City of Greenville*, 578 F.2d 987, 988 [Fifth Cir. 1978]; *Hill v. Western Electric Co.*, 596 F.2d 99 [Fourth Cir. 1979]). Even previous decisions of the Ninth Circuit, rendered subsequent to *East Texas*, have recognized the need to satisfy Rule 23 prerequisites (See, *e.g.*, *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1312 [Ninth Cir. 1977]; *EEOC v. General Telephone Co. of Northwest*, 599 F.2d 322, 327, 334 [Ninth Cir. 1979]). Nevertheless, in the instant case, the Ninth Circuit consistently applies the "broad remedial purpose" doctrine in each instance where careful analysis by the district court finds insufficient facts to show that a Rule 23 prerequisite has been met. It should be noted that the district court had in mind the limiting language of *East Texas* when it found Rule 23 prerequisites were not met (See, Appendix B, pp. 28-29).

This Court's decision in *Geraghty* recognizes the distinction between Article III standing and the satisfaction of Rule 23(a) prerequisites:

> "Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interest of the class.
>
> "[I]t does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interest of the class.' Rule 23(a)." 445 U.S. at 405, 406.

The Fifth Circuit is directly in accord with the foregoing language of this Court (See, *Zeidman, supra*, 651 F.2d at 1044). It should be noted that the Fifth Circuit was the source of this Court's decision in *East Texas* and has been recognized as one of the most liberal circuits insofar as the

application of the "broad remedial purpose" doctrine is concerned (See, Appendix B, p. 28).

On that basis alone (*i.e.*, that respondent cannot fairly and adequately protect the interest of the class), class certification should be denied. It is clear that while respondent's claim arguably arises from the same event, practice, or course of conduct that forms the basis of the class claims, and is arguably based upon the same legal theory, such claim is subject to a defense which is atypical. It is an explicit requirement in Rule 23 that the class representative's claim must not raise defenses unique to it which would detract from efforts to prove the claims of the class. In the instant case, petitioner has raised the defense that respondent was denied employment on a basis independently sufficient to withhold appointment. Unless plaintiff successfully opposes that defense, he will be unable to prove that he was otherwise qualified for appointment but for the consideration of the challenged criminal records. He cannot meet the requirements of *East Texas* that the class representative must suffer the same injury and have the same interests as the putative class.

V.

Contrary to This Court's Decision in *Pullman-Standard v. Swint*, the Ninth Circuit Failed to Apply the Abuse of Discretion Standard and Failed to Remand to the District Court to Apply Correct Legal Criteria.

In reversing the district court's denial of class certification, the Ninth Circuit failed to apply the "abuse of discretion" standard of review. Instead it held that its reversal was based on the district court's application of impermissible legal criteria, although no such criteria were identified. In fact, the Ninth Circuit substituted its own conclusions

for the factual determinations which are properly for the district court to make absent an abuse of discretion. It is well settled in most circuits that class certification determinations necessarily involve "substantial fact questions" and that the district court's decision will not be reversed absent an abuse of discretion (See, *e.g.*, *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038-1039 [Fifth Cir. 1981]).

Closely analogous to the application of the "abuse of discretion" standard in reviewing class certification decisions is the requirement under Federal Rule of Civil Procedure 52(a) requiring the application of the "clearly erroneous" standard to the factual determinations of a district court. This Court has recently held that failure to apply the "clearly erroneous" standard requires the reversal of a decision of a Court of Appeals contrary to the factual determinations of the district court in *Pullman-Standard v. Swint; United Steel Workers of America, AFL-CIO, et al. v. Swint*, ___ U.S. ___, 50 L.W. 4425 (1982).

In *Pullman-Standard* this Court found that while the Court of Appeals purported to be correcting legal errors by the district court in reaching a contrary determination as to the ultimate issue of intent to discriminate, it actually made an independent determination of discriminatory purpose. Such independent determination was made without setting aside the findings of fact of the district court as clearly erroneous. Failure to do so was held to be reversible error.

Petitioner submits that the determination by the Ninth Circuit that class certification is proper without any determination of an abuse of discretion on the part of the district court "strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record." 50 L.W. at 4430. For example, a careful review of the decision of the Ninth

Circuit reveals that no impermissibly applied legal criteria are identified in its finding that the numerosity and adequacy of representation requirements were met. The Ninth Circuit merely concluded that the district court erred in finding that those prerequisites of Rule 23 were not met, but it does not state that the district court abused its discretion, and the analysis of the Ninth Circuit clearly demonstrates that it merely arrived at a different factual conclusion from that of the district court.

Assuming, *arguendo*, that the Ninth Circuit correctly found that the district court did apply impermissible legal criteria in denying class certification, it properly should have remanded to the district court so that the correct legal criteria could be applied to the facts, rather than determining that class certification was proper. This Court in *Pullman-Standard* explicitly stated that "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." 50 L.W. at 4430. A comparison of the careful factual analysis of the district court set forth in its opinion (See, Appendix B, pp. 26-36) and the superficial determinations of the Ninth Circuit clearly reveals that if the record permitted only one resolution of the factual issues, it would have to be that of the district court.

This Court found the failure to remand in *Pullman-Standard* to be "incredible" and stated:

> "It follows that when a District Court's finding on such an ultimate fact is set aside for an error of law, the Court of Appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of fact-finding in the first instance." 50 L.W. at 4430.

For the foregoing reasons, the decision of the Ninth Circuit should be reviewed to determine whether or not this

Court's decision in *Pullman-Standard* is applicable in the context of class certification issues, and, if so, whether or not it should be applied to reverse the Ninth Circuit's determination that the putative class should be certified.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Court grant the Petition for Writ of Certiorari herein.

Executed this 25th day of May, 1982, at Los Angeles, California.

Respectfully submitted,

JOHN H. LARSON,
County Counsel,
By ALAN K. TERAKAWA,
Deputy County Counsel,
Labor Relations Division,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the Court of Appeals.

Charles L. JORDAN, Plaintiff-Appellant, v. COUNTY OF LOS ANGELES Defendant-Appellee. No. 79-3112.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 19, 1980. Decided Feb. 24, 1982.

Applicant for employment brought employment discrimination suit, alleging that county's failure to hire persons because of their arrest records, juvenile records, and marijuana conviction records, discriminated against blacks and males. The United States District Court for the Central District of California, Lawrence T. Lydick, J., denied the applicant's motion for class certification, partial summary judgment, and leave to amend his complaint. Applicant appealed. The Court of Appeals, Tang, Circuit Judge, held that: (1) a settlement agreement entered into by the applicant in the absence of a certified class did not render the action moot and deprive him of standing to prosecute the appeal; (2) class certification should have been granted; and (3) the district court did not abuse its discretion in denying the applicant leave to amend his complaint.

Affirmed in part; reversed in part and remanded.

Schroeder, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Walter Cochran-Bond, Taylor, Roth & Hunt, Los Angeles, Cal., argued, for plaintiff-appellant; A. Thomas Hunt, Los Angeles, Cal., on brief.

Alan Terakawa, Deputy County Counsel, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before TANG, SCHROEDER and NELSON, Circuit Judges.

TANG, Circuit Judge:

Jordan filed an employment discrimination class action against the County of Los Angeles, alleging that the County's failure to hire persons because of their arrest records, juvenile records, and marijuana conviction records violates Title VII and 42 U.S.C. § 1981. Jordan's motions for class certification, partial summary judgment, and leave to amend his complaint where denied. After judgment was entered on Jordan's individual claims, he appealed each of these orders. We reverse the order denying class certification, affirm the order denying Jordan leave to amend his complaint, and decline to review the order denying Jordan's motion for partial summary judgment. The cause is remanded to the district court for further proceedings.

I.

In June 1976, appellant Charles L. Jordan (Jordan), a black male, filed an action against the County of Los Angeles (County), alleging that it had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981 by withholding him from appointment to the position of custodian in September 1973 based upon his juvenile record. Jordan pled a class action, claiming that disqualification based upon applicants' juvenile records disproportionately impacts upon blacks.

In September 1976, Jordan amended his complaint and additionally alleged that disqualification based upon his arrest record and his conviction for a marijuana-related offense also violated Title VII and section 1981. Each separate cause of action involving the three types of criminal record, *i.e.*, juvenile record, arrest record, and marijuana conviction record, was pled as a class action. Jordan's amended com-

plaint further alleged that disqualification based upon each type of criminal record impermissibly discriminated against males.

In October 1977, the parties entered into a stipulation of uncontested facts for purposes of cross-motions for summary judgment and a second stipulation for purposes of Jordan's motion for class certification. Jordan thereafter moved for partial summary judgment and class certification. In December, the district court denied the motion for partial summary judgment on the grounds that genuine issues of fact existed, and denied the motion for class certification because essential facts stipulated to by the parties were unsupported by the record.

In March 1978, Jordan sought leave to amend his complaint in order to replace the Title VII sex discrimination claims with a constitutionally based action under the equal protection clause. The district court granted the portion of the motion that sought to delete the Title VII sex discrimination claims but denied the portion that sought to add causes of action under the equal protection clause.

Jordan filed a second class certification motion in April 1978. In July, the district court denied the motion, finding that Jordan had failed to satisfy the requirements of Federal Rule of Civil Procedure 23. In October, the parties entered into a settlement whereby, in exchange for $500, Jordan agreed to release his individual claims against the County. Pursuant to the settlement agreement, final judgment was entered on January 15, 1979.

On January 19, 1979, Jordan filed a notice of appeal seeking review of the orders denying partial summary judgment, denying in part leave to amend his first amended complaint, and denying class certification. In September, the County moved to dismiss the appeal on the grounds that

Jordan's settlement rendered his individual claims moot and deprived this court of jurisdiction to address the appeal due to the absence of a case or controversy under Article III. Relying upon our decision in *Vun Cannon v. Breed*, 565 F.2d 1096 (9th Cir. 1977), a motions panel dismissed Jordan's appeal for lack of case or controversy on November 16.

Jordan subsequently filed a motion for reconsideration on November 30 and a motion to add parties on April 19, 1980. In light of the Supreme Court's decision in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), rendered on March 19, Jordan's motion for reconsideration was granted and the question whether the appeal presents a justiciable case or controversy despite the settlement agreement, or whether the settlement precludes Jordan from challenging the order denying class certification, was referred to the merits panel. The order dismissing the appeal was vacated and the question whether putative members of the uncertified class should be joined as named plaintiffs-appellants under Federal Rule of Civil Procedure 21 or whether they should be allowed to intervene under Federal Rule of Civil Procedure 24 was referred to the merits panel.

II.

Article III of the Constitution limits federal court jurisdiction to "cases" and "controversies." Federal courts may only entertain "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83,

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[1]In *Vun Cannon*, we held that in the absence of a properly certified class, we did not have jurisdiction to review the dismissal of a purported class action where the individual claim of the class representative had become moot.

95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968). Thus, federal courts are without jurisdiction and no justiciable controversy is presented when the questions sought to be adjudicated are moot, *i.e.*, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed..2d 491 (1969).

The second aspect of the mootness doctrine, the parties' interest in the litigation, has also been referred to as the "personal stake" requirement. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755, 96 S.Ct. 1251, 1259-60, 47 L.Ed.2d 444 (1976). The personal stake prerequisite is designed to insure that the federal judicial power is limited to disputes capable of judicial resolution. A party without the requisite personal interest in the litigation is without "standing" to prosecute the action. See *Flast v. Cohen*, 392 U.S. at 101, 88 S.Ct. at 1953.

At the outset therefore we must decide whether the settlement agreement entered into by the named plaintiff in the absence of a certified class renders this action moot and correspondingly deprives him of standing to prosecute this appeal. As just noted, resolution of this question turns on whether there is a "live" issue between the parties and whether the named plaintiff appellant has a "personal stake" in the outcome.

A.

The first related question before us is whether there is a live controversy between the County and at least some members of the class Jordan seeks to represent. We find that the attempt by several members of the putative class to intervene as party plaintiffs clearly demonstrates the existence of a live controversy. See *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208, 63

L.Ed.2d 479 (1980). The County contends, however, that it has revised its hiring policies so that the new guidelines exclude any potentially impermissible consideration of arrest or conviction records. Thus, it argues that a live issue is lacking and no case or controversy exists. To the contrary, Jordan argues that under the new procedures the County's continued consideration of juvenile offense and marijuana-related conviction records results in disqualification of a substantially disproportionate number of blacks. He also asserts that the County's claim that it no longer considers arrest records as being disqualifying is a mere restatement of its previous policy which the County has not adhered to.

We do not reach the merits of the controversy between the parties since a named plaintiff may not press the appeal on the merits until a class has been certified. See *Deposit Guaranty National Bank v. Roper*, 445 U.S. at 336, 100 S.Ct. at 1172-73.[2] We note, however, that whether the County's hiring considerations are validly related to job performance or whether, in the absence of compelling justification, the policies burden or benefit one race as opposed to another in violation of Title VII, is the heart of the dispute between the parties. Until this issue is resolved by judicial review, it necessarily remains a live controversy. Whether this action is moot therefore turns not on whether there exists a live controversy, but on whether in light of the settlement agreement, the named representative has a personal stake in the outcome of the controversy.

B.

As noted above, the "personal stake" requirement is designed to assure that the case is capable of judicial resolution. "In order to satisfy Article III, the plaintiff must

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[2]For this reason, we decline to review the district court's order denying Jordan's motion for partial summary judgment.

show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979). Only where this personal stake requirement is met can a judicial decision redress the plaintiff's injury or accrue to his or her benefit. The County argues that Jordan has no personal stake in the outcome because the settlement agreement has totally satisfied his individual claims. The terms of the settlement agreement and the release, however, convince us otherwise.

The stipulation to entry of final judgment provided in part:

> [A]ll parties understand that the settlement of Plaintiff Jordan's individual claims will not in any way affect the class action aspects of this case.

The release between Jordan and the County in part stated:

> This is a release of all claims, which claims arose by reason of the withhold from certification of CHARLES L. JORDAN from the position of custodian under Rule 7.04 of the Rules of the Civil Service Commission of County of Los Angeles on or about September 19, 1973. . . .
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> * * * * * *
>
> . . . CHARLES L. JORDAN . . . releases and fully discharges the County of Los Angeles . . . from any and all claims . . . that [he] now, or in the future, may have for . . . losses or damages . . . arising directly or indirectly from said incident [of withhold from certification for appointment to the position of Custodian on or about September 19, 1973]. . . .

Although the settlement agreement and release resolved Jordan's claim for damages arising out of the disposition of his 1973 job application, neither document resolved Jor-

dan's claim for injunctive relief in the event a class is certified and Jordan prevails.[3] The agreement therefore did not dispose of all of Jordan's claims against the County and consequently did not completely divest him of his personal stake in the controversy.[4] In *McLaughlin v. Hoffman*, 547 F.2d 918 (5th Cir. 1977), the court considered a similar situation and arrived at a similar conclusion.

In *McLaughlin*, the named plaintiff filed a Title VII class action challenging defendant's employment practices on behalf of all past, present, and future black and Latin American employees of the defendant. The district court denied class certification and the named plaintiff proceeded to trial on his individual claims. After an award of back pay, attorney's fees, expenses, and injunctive relief directing the employer to cease denying him a promotion, the plaintiff appealed the adverse class certification ruling. In holding that plaintiff McLaughlin retained a personal stake in the controversy, notwithstanding the relief he had obtained, the Fifth Circuit found it dispositive that any future

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[3]Jordan has reapplied for a position with the County and thus would stand to benefit from the class-wide injunctive relief prayed for in his complaint, prohibiting the County from disqualifying applicants' based upon their juvenile, arrest, and marijuana conviction records.

[4]In *United States Parole Commission v. Geraghty*, 445 U.S. 338, 404, 100 S.Ct. 1202, 1212, 63 L.Ed.2d 479 (1980), the Court held that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." The Court, however, expressed no view whether Article III would permit a named plaintiff who settles his or her individual claims after denial of class certification to appeal the adverse class certification order. *Id.* at 404, n.10, 100 S.Ct. at 1212 n.10. Because we hold that the agreement entered into by Jordan and the County did not settle all of Jordan's claims, we need not reach the question reserved by the *Geraghty* court in footnote 10. *Cf. Deposit Guaranty National Bank v. Roper*, 435 U.S. 326, 332, 100 S.Ct. 1146, 1170, 63 L.Ed.2d 427 (1980) (settlement of *all* claims moots case and deprives the court of jurisdiction over the controversy of the named plaintiffs).

injunctive relief granted the class would accrue to the named plaintiff as a class member:

> Here a live controversy still exists between appellant McLaughlin and appellees. In addition to the relief awarded to appellant on an individual basis, the complaint requested class-wide injunctive relief directing appellees to dismantle their allegedly discriminatory hiring and promotion system. As a member of the class alleged in the complaint, appellant stands to benefit in the future from any classwide relief that may be granted by the district court, notwithstanding the fact that he was granted back pay, expenses, attorney's fees, and injunctive relief relative to his sought-after promotion . . . That is, appellant stands to benefit directly from the injunctive relief he requested on behalf of his class, and the controversy between appellant and appellees is therefore sufficiently concrete to support Article III jurisdiction.

547 F.2d at 920-21 (footnotes and citations omitted). *See also Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 277 (10th Cir. 1977) (named plaintiff who continued to be an employee of defendant had past, present, and future interest in outcome of case and thereby standing to maintain action under Title VII).

The settlement did not provide for Jordan to be employed by the County. As a current and potential future applicant, Jordan has a direct stake in seeing that this case is brought as a class action and in obtaining an injunction against the County to require it to cease the employment practices challenged in his complaint.[5]

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[5]Because we hold that appellant has standing to appeal the order denying class certification, there is no need for us to consider whether the motion to add parties should be granted in order to prevent the case from being moot.

III.

We now focus our review on the question whether the district court's class certification ruling was proper. The decision to grant or deny class certification is within the trial court's discretion and will be reversed on appeal only if the court abused its discretion, *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977), or if the court applied impermissible legal standards or criteria, *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1380 (5th Cir. 1974).

The district court denied Jordan's motion for class certification on the grounds that the case failed to satisfy the mandatory prerequisites of Federal Rule of Civil Procedure 23(a).[4] While "[m]ere invocation of the language of Rule 23 in Title VII suits is no mystical legal talisman guaranteeing class treatment," *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir. 1977), Title VII actions are by their nature class complaints and the requirements of Rule 23(a) should be liberally interpreted and applied "so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination." *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1334 (9th Cir. 1977). *Accord, East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453 (1977) ("suits alleging racial or ethnic discrimination are often by their very nature class suits . . . . Common questions of law are typically present"); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340

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[4]Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(10th Cir. 1975) ("[c]lass actions are generally appropriate in Title VII employment discrimination cases").[7] Thus, a trial court's discretion in determining whether a Title VII suit will proceed as a class action is circumscribed by the broad remedial purposes of the Civil Rights Act. *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d at 1334.

A.

With respect to the numerosity requirement, the stipulation entered into by the parties disclosed that at least 110 persons fell within the three classes Jordan sought to represent.[8] According to the stipulation, out of those persons who had been denied jobs by the County, 39 had marijuana convictions, 64 had arrest records, and 71 had juvenile offense records. Based upon this information, the district court concluded that each of the separate classes was not too large for joinder.

Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable. *See* 3B *Moore's Federal Practice* ¶ 23.05[1] (2d ed. 1974). Where the class is not so numerous, however, the number of class members does not weigh as heavily in determining whether joinder would be infeasible. In the latter situation, other factors such as the geographical diversity of class members, the

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[7]In the course of enacting the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, the Senate Labor and Public Welfare Committee made the following comment in recommending that class action lawsuits not be limited to recovery for back pay: "The [Senate] Committee agrees with the courts that Title VII actions are by their nature class complaints and that any restrictions on such actions would greatly undermine the effectiveness of Title VII." S.Rep.No. 92-415, 92d Cong. 1st Sess. 27 (1971), U.S.Code Cong. & Admin.News 1972, p. 2137. *See also* 118 Cong.Rec. 4942 (1972).

[8]In Jordan's amended complaint, each separate cause of action based upon the County's consideration of juvenile records, arrest records, and marijuana conviction records was pled as a class action.

ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder. *See* 1 H. Newberg, *Class Actions* § 1105 (1977).[9]

Although we would be inclined to find the numerosity requirement in the present case satisfied solely on the basis of the number of ascertained class members, *i.e.*, 39, 64, and 71, we need not do so since the presence of other indicia of impracticability persuade as that the requirement has been met.[10] First, the relatively small size of each class member's

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[9]For example, in *Dale Electronics Inc. v. RCL Electronics, Inc.*, 53 F.R.D. 531 (D.N.H.1971), the court held that joinder of 13 class members was clearly impracticable where the members were spread out from North Carolina to Nebraska and from California to New York. In *Swanson v. American Consumer Industries*, 415 F.2d 1326 (7th Cir. 1969), the court held that 40 class members was a sufficiently numerous group to satisfy Rule 23(a)(1) where the class members were widely scattered and their individual claims were too small to warrant instituting separate actions. And, in *Afro American Patrolmen's League v. Duck*, 366 F.Supp. 1095 (N.D.Ohio 1973), *aff'd in part, remanded in part*, 503 F.2d 294 (6th Cir. 1974), a Title VII employment discrimination class action seeking injunctive relief, the court found the numerosity requirement to have been met based upon the large number of future class members, even though the class members' identities could not be precisely ascertained. *See also* 7 Wright and Miller, *Federal Practice and Procedure* § 1771, at 662-63 (1972) (the courts' permissive attitude toward Title VII suits is reflected by a liberalized application of the Rule 23(a) requirements in Rule 23(b)(2) cases).

[10]Classes with fewer known class members have been certified in the following cases: *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (41-46 class members); *Cross v. National Trust Life Insurance Co.*, 553 F.2d 1026, 1030 (6th Cir. 1977) (7 class members); *Afro American Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (35 class members); *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974) (51 class members); *Arkansas Education Ass'n v. Board of Education*, 446 F.2d 763, 765 (8th Cir. 1971) (20 class members); *Cypress v. Newport News Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (18 class members); *Colston v. Maryland Cup Corp.*, 18 Fair Empl. Prac. Cas. 83, 85 (D.Md.1978 (25 class members); *Smith v. General Motors Corp.*, 14 Fair Empl.Prac.Cas. 987, 991 (E.D.Mich.1977) (35 class members); *United States v. Terminal Transport Co.*, 13 Fair Empl.Prac.Cas. 1284, 1290 (N.D.Ga.1976) (75 employees and 23 applicants in the class); *Crenshaw v. Maloney*, 13 Fair Empl.Prac.Cas. 154, 155 (D.Conn.1976) (16 class members); *Watson v. City of New Orleans*, 12 Fair Empl.Prac.Cas. 1625, 1625-26 (E.D.La.1974) (28 employees and 50 applicants in the class); *Sabala v. Western Gillette, Inc.*, 362 F.Supp. 1142, 1146-47 (S.D.Tex.1973) (26 class members); *Local 246, Utility Workers v. Southern California Edison Co.*, 2 Fair Empl.Prac.Cas. 328, 329-30 (C.D.Cal.1969) (26 class members).

claim and the probability that the class members may be difficult to locate combine to make it impracticable for individual class members to join in the lawsuit by instituting separate actions. *See Harris v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D.Cal.1977); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287 (D.Del.1975). Second, the class is composed of unnamed and unknown future black applicants who may be discriminated against by the County's employment practices. The joinder of unknown individuals is inherently impracticable. *See Jack v. American Linen Supply Co.*, 498 F.2d 122 (5th Cir. 1974); *Scott v. University of Delaware*, 68 F.R.D. 606 (D.C.Del. 1975). Accordingly, the district court erred in denying class certification for failure to satisfy the numerosity requirement.

B.

Rule 23(a)(2) requires that there be common question of law or fact among the members of the class. The district court found that the commonality requirement had not been met because the proposed class includes persons who have been denied employment solely on the basis of their criminal records and persons whose criminal records were only a contributing factor. Thus, the court concluded that there are diverse questions of law and fact as to the various other factors upon which the denial of employment was based.

In reaching its conclusion that the commonality prerequisite had not been satisfied, we think the district court applied incorrect legal criteria. Rule 23(a)(2) does not require that every question of law or fact be common to every member of the class. *See Mosley v. General Motors Corp.*, 497 F.2d 1330, 1334 (8th Cir. 1974); *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045, 92 S.Ct. 1309, 31 L.Ed.2d 588 (1972); *Fox v. Prudent Re-*

sources Trust, 69 F.R.D. 74 (E.D.Pa.1975); *Cottrell v. Virginia Electric Power Co.*, 62 F.R.D. 516 (E.D.Va.1974). The commonality requirement is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *American Finance System, Inc. v. Harlow*, 65 F.R.D. 94, 107 (D.Md.1974) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964)). *See also Gibson v. Local 40, Supercargoes & Checkers, Etc.*, 543 F.2d 1259, 1264 (9th Cir. 1976).

Courts that have analyzed Rule 23(a)(2) have generally given it a permissive application in a variety of substantive law areas so that the commonality requirement is usually found to be satisfied. 7 Wright & Miller, *Federal Practice and Procedure* § 1763, at 604 (1974). In employment discrimination cases brought under Title VII, the legality of defendant's practices or policies will usually be a question common to the class, and the existence of different factual questions with respect to various employees will not defeat satisfaction of the commonality requirement. As the court explained in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969):

> While it is true, as the lower court points out, that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to the class.'

See also Mack v. General Electric Co., 329 F.Supp. 72, 75-76 (E.D.Pa.1971); *Bennett v. Gravelle*, 323 F.Supp. 203, 219 (D.Md.), *aff'd*, 451 F.2d 1011 (4th Cir. 1971), *cert. denied*, 407 U.S. 917, 92 S.Ct. 2451, 32 L.Ed.2d 692 (1972).

In the present case, Jordan seeks to represent classes composed of past, present, and future black applicants, ex-

cluding applicants for sworn law enforcement positions, who have been or will be denied employment with the County based in whole or in part upon that person's juvenile record, arrest record, or marijuana-related conviction record. The question of law common to all these class members is whether each type of criminal record is validly related to job performance or whether, in the absence of compelling justification, disqualification based upon such records impermissibly discriminates against blacks. The very existence of such a policy, if shown to be discriminatory, affects all members of the class and is a common question sufficient to support a class action under Title VII. *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.) *cert. denied*, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d at 1124. Even though some relief regarding damages may need to be tailored to redress particular class members' injuries, the injunctive relief sought pursuant to Rule 23(b)(2) will, if granted, inure to the benefit of all class members.[11]

C.

The third requirement necessary to maintain a class action under Rule 23(a) is that the claims or defenses of the named representative be typical of the claims or defenses of the class. The district court found that Jordan had failed to satisfy the typicality prerequisite because his failure to obtain employment may have resulted from a poor prior work record and not from any impermissible consideration of his criminal records by the County. Although Jordan argued

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[11]Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

that the court should not have considered the merits of the case in connection with the class certification motion, the district court felt that the merits had to be addressed in order to rule on the motion.

The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class. In this respect, the typicality prerequisite is closely related to both the 23(a)(2) requirement that there be common questions of law or fact and the 23(a)(4) requirement that the named plaintiff adequately protect the interests of the class.

The named plaintiff's claim will be typical of the class where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class. *Long v. Sapp*, 502 F.2d 34, 42-43 (5th Cir. 1974). Thus, a named plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory. *See Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975); *Smith v. B & O Railroad*, 473 F.Supp. 572, 581 (D.Md.1979); 1 H. Newberg, *Class Actions*, § 1115 (1977).

As long as the named representative's claim arises from the same event, practice, or course of conduct that forms the basis of the class claims, and is based upon the same legal theory, varying factual differences between the claims or defenses of the class and the class representative will not render the named representative's claim atypical. *Smith v. B & O Railroad*, 473 F.Supp. at 581. Moreover, the class representative need not demonstrate a likelihood of success on the merits in order to maintain a class action. As the

Court stated in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974):

> [N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

In so ruling, the Court agreed with the Fifth Circuit's conclusion in *Miller v. Mackey International*, 452 F.2d 424, 427 (5th Cir. 1971), where the court said: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but whether the requirements of Rule 23 are met."

Our examination of the claims of the class representative vis-a-vis the claims of the class persuades us that the typicality prerequisite has been satisfied. Both the named plaintiff and the putative class members allege injury or potential injury resulting from the County's alleged discriminatory practice of denying employment to persons with three specific types of criminal record. As both the claims of the named representative and the claims of the class stem from the same practice of the defendant and are based upon the same legal theory, the required nexus is present. The existence of this nexus is further demonstrated by the fact that the requested injunctive relief will, if granted, inure to the benefit of the class and the class representative as a member thereof. *See, e.g., Black Grievance Committee v. Philadelphia Electric Co.*, 79 F.R.D. 98 (E.D.Pa.1978); *Buchholtz v. Swift & Co.*, 62 F.R.D. 581 (D.Minn.1973). The district court's speculation here that the named representative was not hired due to his prior work history is the type of preliminary inquiry into the merits of the action that the Supreme Court in *Eisen* held had no place in the class certification determination.

Additionally, the district court found and the County argues that common questions of law or fact are not present and Jordan's claims are atypical of the class because of the various job-related factors that the County must consider with respect to each job in its hiring decisions. The court proposed to limit the class to custodians like Jordan, since arrest and other similar records could be related to job competency. In support of this limitation, the court gave the example of where a child-molestor's juvenile record may be relevant to the school bus driver's job or where a marijuana conviction may relate to the applicant's ability to drive a motor vehicle. We reject this proposed limitation.

Where, as in the present case, the named plaintiff makes an "across-the-board" attack on the defendant's employment practices, alleging that the policies are racially discriminatory as they apply to blacks, the named plaintiff is entitled to represent all employees who have allegedly suffered from the challenged practices even though some class members are not engaged in the same work as the named plaintiff. *See Rich v. Martin Marietta Corp.*, 522 F.2d at 344; *Johnson v. Georgia Highway Express*, 417 F.2d at 1124. Variations regarding qualifications and prior work records are typically present in Title VII employment discrimination cases. Where the common thread of discrimination is alleged to weave through the defendant's employment practices, the varying ways in which the alleged discriminatory policy affects different class members, if at all, should not preclude class certification. *See Gibson v. Local 40*, 543 F.2d at 1264; *Senter v. General Motors Corp.*, 532 F.2d at 524, *Harris v. Palm Spring Alpine Estates*, 329 F.2d 909, 914 (9th Cir. 1964).

The district court's reasons for restricting the class to custodians goes to the very merits of the action. As noted earlier, such an inquiry into the merits of the case is not

proper at the class certification stage.[12] Moreover, restricting the class in the manner proposed would not be in accordance with the established policy of liberally applying Rule 23(a) requirements in Title VII cases and would contravene the purpose of Title VII in eliminating class-based employment discrimination.

D.

Under Rule 23(a)(4), the named representative must "fairly and adequately protect the interests of the class." This requires that the named representative's attorney be qualified, experienced, and generally capable to conduct the litigation, and that the named representative's interests not be antagonistic to the interests of the class. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968)), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

Although Jordan's attorney, Mr. Walter Cochran-Bond, has apparently been involved in a number of federal employment discrimination cases, the district court questioned his adequacy because he claimed only three years experience and because his papers before the court indicated some unfamiliarity with federal practice. Although Mr. Bond claimed to have associated counsel from the Center for Law in the Public Interest, the district court concluded the Center was not involved in the case since no attorney from the Center had signed any papers or made any recent appearance before the court. With respect to the interests of the named representative, the court found that Jordan's interests were antagonistic to those of the remaining class members be-

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[12]Any ruling on the merits of the action is more properly the subject of a Rule 12(b)(6) or a Rule 56 motion.

cause he may be required to defend charges at trial that he was denied a job due to his prior work record.

Based upon the papers filed in this court, including appellant's briefs, we are satisfied that Jordan's attorneys are qualified, experienced, and generally capable of conducting this class action litigation. While Mr. A. Thomas Hunt, counsel for the Center for Law in the Public Interest may not have been actively involved in the case in the district court, he apparently has taken an active role in the case since then, insofar as his name appears on all the papers filed in this court.[13]

We do not perceive of any interest of the class representative that is antagonistic to the interests of the class. Jordan's interest in eliminating any impermissible consideration of criminal records in the County's hiring decisions is coextensive with those of the remaining class members. The fact that Jordan may be required to prove that he was not hired due to his prior work record does not establish that his interest in eradicating the challenged practices is antagonistic to the class.

In accordance with the foregoing, we hold that the district court applied impermissible legal criteria in denying Jordan's motion for class certification. The order denying the motion is reversed.

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[13]We emphasize that we are not necessarily disagreeing with the court's evaluation. We conclude only that the record now before us does not support the conclusion that the class does not have adequate legal counsel. The court on remand may condition class certification upon active participation as co-counsel of attorneys from the Center for Law in the Public Interest or other counsel the court deems adequate. *See Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546, 560 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977). The court is also free to re-evaluate the adequacy of counsel throughout the pendency of the action. Fed.R.Civ.P. 23(c)(1).

IV.

Jordan also appeals the district court's order denying him leave to amend his complaint. Jordan sought to amend his complaint by adding an equal protection cause of action based on state law provisions that permit persons to have their criminal records sealed or expunged. His theory is that since some people are successful in having their records sealed, the County's consideration of the criminal records of those persons who did not have their records sealed results in treating similarly situated persons differently.

The district court denied Jordan's motion to amend because: (1) adding the new causes of action would require the County to conduct further discovery, resulting in additional expense and further delay; and (2) Jordan had not satisfactorily demonstrated why the additional causes of action were not included in the original complaint. Jordan argues that the district court denied his motion without finding that the County would have been "unduly prejudiced" by the amendment.

Federal Rule of Civil Procedure 15(a) requires that leave to amend after a responsive pleading has been filed "shall be freely given when justice so requires." Although such motions under the Rule should be freely granted, the decision to grant such a motion is entrusted to the sound discretion of the trial court. *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (5th Cir. 1980); *PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659 (9th Cir. 1969), *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970). The crucial factor in determining whether leave to amend should be granted is the resulting prejudice to the opposing party. Where no such prejudice is shown, leave to amend should be freely given. *See Howey v. United States*, 481 F.2d 1187 (9th Cir. 1973); *see also*

Wyshak v. City National Bank, 607 F.2d 24 (9th Cir. 1979). In *Howey* we found that the proffered amendment would not have unduly prejudiced the opposing party. We held that the trial judge should have inquired into whether the opposing party would have been required to conduct further discovery and suggested that had the amendment required the opposing party to conduct extensive discovery, the motion denying leave to amend may have been correct. 481 F.2d at 1191.

In the present case, the district court explicitly found that Jordan's amendment would have prejudiced the County by requiring it to engage in further discovery. Because Jordan's proposed amendment raised substantial issues of state law not closely connected with the issues raised under Title VII and section 1981, the County would have been required to conduct extensive, costly discovery in order to respond to the amended complaint. Moreover, the liberality of Rule 15(a) does not mean that amendment will be allowed regardless of the diligence of the moving party. Where the party seeking amendment knows or should know of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend may be denied. *See Svoboda v. Trane*, 495 F.Supp. 367 (E.D.Mo.1979), *aff'd*, 655 F.2d 898 (8th Cir. 1981); *Dow Corning Corp. v. General Electric Co.*, 461 F.Supp. 519 (N.D.N.Y.1978). Here, Jordan's attorneys have proffered no satisfactory reasons for failing to include the equal protection causes of action in the original complaint. On these facts, we find no abuse of discretion in the district court's denial of Jordan's motion to amend his complaint.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

SCHROEDER, Circuit Judge, concurring in part and dissenting in part:

This is an appeal from a denial of class certification. The majority holds that the class should be certified despite the fact that the party seeking to represent the class has voluntarily settled all of his individual claims against the defendant.

I agree with the majority that, on the basis of the record presented to the district court at the time of its class certification ruling, the putative representative's claim was typical of the claim of the class and that the class was sufficiently numerous to satisfy the requirements of Rule 23. I further agree with the statement by the majority in footnote 13 that any further proceedings should be conditioned upon active participation by counsel for plaintiff which the district court deems adequate.

I do not agree with the majority, however, that the appellant seeking to represent the class in this matter retains any personal stake after he has compromised all of his individual claims. The only person now before the court with anything tangible to gain from the litigation is the appellant's lawyer; I am not alone in finding that situation distasteful. *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 422-24 & nn. 17, 18, 20 & 21, 100 S.Ct. 1202, 1222-23 & nn. 17, 18, 20 & 21, 63 L.Ed.2d 479 (1980) (Powell, J., dissenting); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 351, 353 & n. 13, 357, 100 S.Ct. 1166, 1180, 1181 & n. 13, 1183, 63 L.Ed.2d 427 (1980) (Powell, J., dissenting).

Nevertheless, as I read the recent Supreme Court decisions in cases in which the representative party's individual claims have become moot, there is no fixed requirement that the "personal stake" survive until the litigation has run its course. That was the holding in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), where the named plaintiff's claim became moot after the district court had

granted class certification, and in *Geraghty, supra*, where the representative's claim became moot after the district court had denied class certification. These decisions have shifted the focus of the inquiry in such cases from the justiciability of the putative representative's claim, to the adequacy of his representation of the class. *See Geraghty, supra*, 445 U.S. at 405-06, 100 S.Ct. at 1214, *quoting Sosna, supra*, 419 U.S. at 403, 95 S.Ct. at 559; 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1776, at 39 (Supp.1981). *See also Note, Class Standing and the Class Representative*, 94 Harv.L.Rev. 1637, 1653-56 (1981).

> The determination that class status should have been granted requires a further determination whether the representative plaintiff will continue to satisfy the requirements of Rule 23 that the class be fairly and adequately represented, notwithstanding the loss of a personal stake in the outcome.

13 C. Wright & A. Miller, *supra*, § 3533 at 40 (Pocket Part to Cumulative Supp. 1980).

The Supreme Court has indicated that what is needed is "vigorous advocacy," which "can be assured through means other than the traditional requirement of a 'personal stake in the outcome.' " *Geraghty, supra*, 445 U.S. at 404, 100 S.Ct. at 1212.

The precise qualities necessary for vigorous advocacy have yet to be spelled out by the Supreme Court. Nevertheless it appears to me that this appellant, who voluntarily settled his personal claims *in toto*, is in a far weaker position to provide such representation than was the appellant in *Geraghty*, whose claims had been mooted by circumstances beyond his control. I am unable to see how this appellant could possibly provide adequate, much less "vigorous,"

representation of the claims of others when he has seen to it that his own have been satisfied.

I recognize the possibility, however, that others may have relied upon this appellant's pursuit of the litigation. See *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y.1971) (passim), in which Judge Frankel discusses the need to protect class members who may have relied for presentation of their claims, on "class" litigation brought by a party who later desires to settle his individual claims.

I would not permit this appellant to pursue this litigation; I would instead remand for consideration of possible intervention by other members of the putative class.

APPENDIX B.

Reporter's Transcript of Proceedings; Los Angeles, California; Tuesday, May 30, 1978.

United States District Court, Central District of California.

Honorable Lawrence T. Lydick, Judge Presiding.

Charles L. Jordan, Plaintiff, v. County of Los Angeles, Defendant. CV 76-1925-LTL.

LOS ANGELES, CALIFORNIA; TUESDAY, MAY 30, 1978; 10:00 A.M.

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THE CLERK: Item 1 on the calendar, case No. CV-76-1925-LTL: Charles L. Jordan v. County of Los Angeles.

Appearances, please, counsel.

MR. COCHRAN-BOND: Walter Cochran-Bond appearing for plaintiff.

MR. TERAKAWA: Alan Terakawa appearing for the defendant.

THE COURT: Again, counsel, we have read and reviewed all of the material submitted. Does anyone have anything additional to offer?

MR. COCHRAN-BOND: Plaintiffs have nothing additional, your Honor.

MR. TERAKAWA: Defendants have nothing additional unless the court desires some response to the arguments raised by plaintiff in its reply brief.

THE COURT: Thank you. This is a purported class action brought under Title VII and under 42 U.S. Code 1981 for injunction, back pay, and certain affirmative relief based on defendant County of Los Angeles's alleged unlawful racially and sexually discriminatory use of arrest records, marijuana conviction records, and juvenile records

in determining the non-eligibility for employment as a custodian of black, male plaintiff Charles L. Jordan.

Defendant denies the allegations and affirmatively states that it has no employment policy as to marijuana convictions, and that plaintiff would be ineligible in any case for the job because he had been fired from his previous job, showing an unsatisfactory employment record, such information being taken from the first amended complaint filed September 20, 1976, before defendant had answered the original complaint, and from defendant's answer to the first amended complaint.

On November 21, 1977, plaintiff's motions for class certification and for partial summary judgment was denied. Plaintiff's motion to amend was denied on February 21, 1978, on the ground that it was improper procedure to propose new amendments in the reply to defendant's response to the motion. Plaintiff's renewed motion to amend was denied on March 20, 1978, insofar as it sought to add causes of action and granted insofar as it sought to delete the sex discrimination causes of action.

The pretrial conference has been continued five times and is now set for June 26, 1978.

Jurisdiction is proper under 42 U.S. Code, Section 2000e-5 and under 28 U.S. Code, Section 1343.

What we have before us is plaintiff's renewed motion to maintain the case as a class action. The proposed class for the motion is as follows:

> "All past, present, and future black "applicants for employment within the County of Los Angeles, excluding applicants for the positions of deputy sheriff, deputy marshal, and any other similar sworn law enforcement positions, who have been or in the future may be determined to be ineligible for employment based in whole or in part upon: (a) that person's record

> of having committed an offense as a juvenile; (b) that person's record of an adult or juvenile arrest (detention) that did not result in a conviction (wardship); and/or (c) that person's record of having been convicted for a marijuana-related offense."

Class certification is controlled by Rule 23 of the Federal Rules of Civil Procedure. In order to bring a class action, plaintiff must meet all of the requirements of Rule 23(a) and one of the requirements of Rule 23(b). However, the standard of scrutiny seems to be lower in Title VII actions:

> ". . . may lower courts, and particularly the Fifth Circuit, have treated Title VII cases more leniently under Rule 23 than other types of cases."

There are three rationales upon which courts have readily certified class actions in Title VII cases: (1) discrimination actions are necessarily class actions; (2) allegations of "across-the-board" discriminations are made; and (3), the focus is on preventing discrimination against future unknown discriminations.

These rationales are provided by the same author who provided the previous noted statement.

More significantly the Ninth Circuit has also taken a broad view of Title VII class actions, holding that the broad remedial purposes of Title VII are to be considered carefully in order to avoid unduly restrictive application of Rule 23.

However, our circuit says that Rule 23 is not a "meaningless formality." As the Supreme Court recently said, "We are not aware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Federal Rule of Civil Procedure 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself en-

sure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." East Texas Motor Freight v. Rodriquez (1977) 431 U.S. 395 at pages 405 and 406.

Thus a Title VII complaint is no substitute for facts. A determination as to class action status should be made on more information than the complaint itself affords.

> "A liberal interpretation of Rule 23 standing alone, however, is no substitute for at least a minimal showing of facts supporting the class action allegations. Mere invocation of the language of Rule 23 in Title VII suits is no mystical talisman guaranteeing class treatment." Doninger v. Pacific Northwest Bell, 564 F.2d at page 1312.

The first requirement of Rule 23 is numerosity. This requirement is met when joinder is shown to be inconvenient. In Gay v. Waiters' and Dairy Lunchmen's Union, (9th Cir. 1977) 549 F.2d 1330, the Ninth Circuit overturned the district court's ruling that 184 persons was not numerous enough to constitute a class, holding that the court failed to consider the remedial purposes of Title VII.

The second requirement is that there be questions of fact or law common to the class. If individual issues predominate, then a class is not appropriate; however, a racially discriminatory policy has been found to be a common question of fact.

In addition, the "across-the-broad" doctrine may allow satisfaction of the common question requirement. The Ninth Circuit has not emphasized this requirement. In Marshall v. Holiday Magic, 550 F.2d 1133, the court noted only two general requirements under Rule 23 — numerosity and adequacy of representation — and stated that substantial con-

flict as to the subject matter of the dispute would be necessary to prevent class treatment.

The third requirement is that the representatives are typical of claims or defenses of the class. This requirement is sometimes blended with the adequacy requirement to be discussed later. Typicality questions clearly arise where, as here, representatives with no claims seek to represent a broad class. For example, if a business's overall practices are not challenged, a court may limit the class to those workers at one facility, and by way of further example courts have split as to whether a plaintiff entitled only to back pay can represent plaintiffs who have other interests, such as concerning future job conditions.

The fourth requirement is that representatives fully and adequately protect the interests of the class. This requirement, while often blended as previously noted with the typicality requirement, has been read by some courts to include the need for a showing of competent counsel.

If the requirements of Rule 23(a) are satisfied, plaintiff here would then seek to apply Rule 23(b), too, involving acts by defendants that are applicable to the class as a whole, thereby justifying injunctive relief. Title VII class actions have been upheld under Rule 23(b)(2) in some cases, and the fact that equitable relief in the form of back pay is also sought is not favorable to the class action.

Some courts have allowed such relief under Rule 23(b)(2), reasoning that an employment discrimination suit is essentially equitable and should not be characterized as predominantly seeking money damages. Other courts, however, have treated back pay separately under Rule 23(b)(3).

Schlei and Grossman say that "such treatment is advantageous to defendants, since under Rule 23(b)(3) each individual claimant must prove the extent of his injury."

We note that the Ninth Circuit has found that back pay is a form of equitable relief, Slack v. Havens (9th Cir. 1975) 522 F.2d 1091 at 1094. However, to the extent that monetary restitution predominates over injunctive relief, Rule 23(b)(2) is inappropriate. Doninger v. Pacific Northwest Bell (9th Cir. 1977) 564 F.2d 1304 at 1314.

The motion before us is really a motion for reconsideration of the previously denied motion for class certification, although plaintiff does not trouble to make any special request for reconsideration. However, plaintiff claims to have fixed the flaws in the previous motion, especially as to plaintiff's showing of numerosity.

Turning to the showing of plaintiff as to each of the requirements of Rule 23(a), it appears first that the requirement of numerosity is still not adequately satisfied. The stipulation submitted by the parties, filed April 7, 1978, shows that only 110 persons fall in the exceptionally broad class proposed by plaintiff. While the Ninth Circuit in Gay overturned a ruling that 184 persons were not insufficient, 110 persons is little more than one-half that amount. In addition, plaintiff vacillates between referring to his proposed class as one class and as several classes.

It appears that indeed several classes are involved, since defendant would be required to give different and separate justifications for each of the three practices which are alleged to be discriminatory. However, according to the stipulation, of those persons denied jobs by defendant, only 39 had marijuana convictions, 64 had arrests, and 71 had juvenile offenses.

Each of these separate classes is clearly not too small for joinder, particularly — Each of these separate classes is clearly not too large for joinder, particularly if their claims would be considered in three separate trial proceedings.

Finally, if only custodians such as the plaintiff here, who have been denied jobs, are considered the proper class, then the group involved would presumably be much smaller than 110. The possible existence of future class members is insufficiently demonstrated to satisfy the numerosity requirement by itself.

The second requirement is that there be questions of fact or law common to the class. The class would be made of those who had been denied employment based in whole or in part on their arrest, etc., records. Since such records are just a part of the basis for denial, then there are diverse questions of fact and law as to the various other contributing bases for denial of employment.

Thus, substantial conflict re questions of fact or law between the individual class members can be anticipated in this case, and a charge of "across-the-board" discrimination cannot here satisfy the commonality requirement.

Thirdly, plaintiff as class representative must have claims or defenses typical of the class. This requirement is particularly a problem in this case where plaintiff's case involves a distinct issue as to whether he was fired due to poor prior job performance.

Plaintiff interposes the argument that the court should not consider the merits of the case on a motion for class certification. However, on this motion the issue of plaintiff's prior work performance goes directly to Rule 23 questions of typicality, commonality, and adequacy of representation, and must therefore be considered.

On the record here plaintiff's prior work performance is a major issue to be tried.

The fourth requirement, that plaintiff and counsel will adequately represent the class, is also not clearly established. Although plaintiff has each of the records, the con-

sideration of which is allegedly illegal, he may be forced to expend much trial time meeting charges that he was denied a job solely for poor prior work performance, and thus not adequately represent the class on the purported class issues.

As for plaintiff's counsel, his adequacy is also in question. He claims only three years experience, although he has apparently been involved in a number of federal cases in the area of employment discrimination.

In addition, his papers in this case have indicated a certain unfamiliarity with federal practice. For example, plaintiff is at present appealing the denial of a motion to amend, which appeal of an interlocutory order may well be dismissed as premature. Plaintiff's counsel says in his papers that he assumed such an appeal would stay matters here, until the court clerk informed him otherwise. Plaintiff's counsel recently made a motion to amend in which it appeared that there was no federal jurisdiction for the causes to be added. Such amendment was later withdrawn in that form when defendant's opposition pointed out the problem.

Plaintiff claims to have counsel from the Center for Law in the Public Interest assisting as well, but they do not seem actively involved in the case, since they appear to personally sign no papers and have made no recent appearances in the case.

Lastly, even if some class might be appropriate in some of the circumstances here shown, it would appear that it is too broadly drawn by plaintiff. Ideally the class would be composed of persons who were excluded only on the basis of their arrest, etc., records, but that would exclude plaintiff and very possibly make the class small enough for joinder.

Plaintiff has included here as purported class members all persons other than law enforcement personnel denied

jobs in part for their arrest, marijuana conviction, and juvenile records. Even if plaintiff could overcome other impediments to certification, this class is altogether too broad due to the numerous special job-related considerations that must arise in the tens of thousands of jobs the County of Los Angeles fills.

Defendant suggests a class composed only of custodians, and that would certainly be more appropriate. To give examples where arrest and other similar records may well be related to one's job competency, a child molestor's juvenile conviction may be relevant to the school bus driver's job that that person may seek; or a marijuana conviction may relate to one's ability to properly drive a cab or bus. See Lane v. Inman (5th Cir. 1975) 509 F.2d 184.

Plaintiff argues, citing Griggs v. Duke Power, 401 U.S. 424 (1971), that the defendant must justify any criteria it uses to hire persons by a validity test showing job-relatedness of the criteria. However, for rebuttal, defendant is ". . . entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event." See East Texas Motor Freight v. Rodriquez (1977) 431 U.S. 395 at 403 and 404, note 9. See also Lane v. Inman previously cited, where it states:

> "We also decline to extend our employment testing device holding of discrimination . . . to this case where the ordinance, as distinguished from employment mental and ability tests, is so obviously job-related in determining who is to be entrusted to operate taxicabs."

Thus, consideration of the past work record, even in the absence of a validity test showing that past work performance bears on present work performance, would seem clearly proper.

The court finds on the record before it, for the reasons previously stated, and others, that plaintiff has not met the requirements of Rule 23 regarding numerosity, commonality of questions of fact and law, that plaintiff as class representative has claims or defenses typical of the proposed class, or that plaintiff and his counsel will adequately represent the proposed class.

Most of the deficiencies found are, of course, directly related to the fact that the proposed class is so broadly drawn. While some of them by themselves, such as the numerosity question, might not individually suffice to defeat a motion for class certification, the totality of the problems combined makes class certification impossible.

The motion for class certification accordingly is denied.

The court notes that this is the third motion for class certification filed by counsel for plaintiff. Although one of these was withdrawn for various reasons, we are concerned that counsel may be neglecting the orderly progress and prosecution of this action on behalf of his individual client in his effort to create a class action situation.

Accordingly, he is ordered to proceed with preparation for the pretrial conference in this action presently set for June 26, 1978, after five prior continuances on the basis of his representation of the individual plaintiff here involved, and is advised that failure to do so may result in imposition of sanctions, including dismissal of this action for failure to prosecute.

MR. COCHRAN-BOND: Your Honor, one matter: It is my understanding that the Ninth Circuit has so ruled in a couple of cases, including I believe the Gay v. Waiters' case, that a denial of a class certification motion is a final judgment entitled to appeal.

THE COURT: Your understanding of the law of the Ninth Circuit has been on a number of occasions totally incorrect. You should take another look at it in this case also, counsel.

What is your point? The ruling has been made. What do you desire?

MR. COCHRAN-BOND: What I desire, your Honor, is that it would then be inappropriate to go to pretrial with a —

THE COURT: If you have a motion to make, you put it in writing, you support it by a memorandum of points and authorities, and you set it for hearing in the usual course under the rules of this court.

In the meanwhile, you will observe the orders of this court as just made, strictly.

(Other court matters.)

— — —

APPENDIX C.

Stipulation to Entry of Final Judgment Re Individual Claims of Charles L. Jordan.

United States District Court, Central District of California.

Charles L. Jordan, Plaintiff, v. County of Los Angeles, Defendant. Civil Action No. 76-1925-LTL.

Filed: October 26, 1978.

WHEREAS, Plaintiff Charles L. Jordan filed his Complaint commencing this lawsuit on June 16, 1976 and a First Amended Complaint was filed on September 20, 1976, alleging a class action against Defendant County of Los Angeles and challenging defendant's employment practices of considering an applicant's juvenile record, arrest record and record of marijuana-related convictions as being unlawfully discriminatory by race and hence violative of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* and 42 U.S.C. §1981;

WHEREAS, plaintiff's motion to maintain the case as a class action was heard on May 30, 1978, the Court denied plaintiff's motion and the case thereafter has proceeded as an individual action on behalf of Plaintiff Jordan;

WHEREAS, Plaintiff Jordan and Defendant County of Los Angeles have agreed to settle the individual claims of Plaintiff Jordan without trial or adjudication of any issue of fact or law herein, and without this Stipulation constituting evidence or an admission with respect to any such issue;

WHEREAS, all parties understand that the settlement of Plaintiff Jordan's individual claims will not in any way affect the class action aspects of this case and that the settlement is not to be taken as any admission by defendant

that the class action claims have any merit or that Plaintiff Jordan is a proper representative of the class; and

WHEREAS, defendant hereby admits the jurisdiction of this Court with respect to the subject matter of this action and of the parties hereto and enters a general appearance;

NOW, THEREFORE, without trial or adjudication of any issues of fact or law raised by the complaint herein, the parties hereby agree as follows:

1. Plaintiff and defendant hereby waive the entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure and consent to the entry by the Court of the Final Judgment in the form annexed hereto as Exhibit A, at any time after the date hereof upon motion of plaintiff filed concurrently herewith;

2. Defendant County of Los Angeles shall pay the sum of Five Hundred Dollars ($500.00) to Plaintiff Charles L. Jordan in full satisfaction of all of his claims in this lawsuit. Plaintiff Jordan shall not pursue his individual claims against Defendant County and shall release and fully discharge Defendant County for any damage, liability, claim or remedy for the acts relating solely to him as an individual as alleged in the First Amended Complaint.

3. No award of costs including attorneys' fees shall be made at this time. Should plaintiff prevail on appeal and upon subsequent remand on the class action liability issues, plaintiff is not precluded hereby from petitioning the Court for an award of costs including attorneys' fees that includes the costs expended in prosecuting Plaintiff Jordan's individual claim. It is recognized that defendant makes no admission hereby that plaintiff would be entitled to recover these costs at such later time.

4. Neither this Stipulation nor the Judgment, nor anything contained herein or therein shall constitute evidence

or an admission or adjudication with respect to any allegation of the First Amended Complaint or any fact or conclusion of law with respect to any matter alleged in or arising out of the First Amended Complaint or of any wrongdoing or misconduct on the part of the defendant, or any officer or affiliated person thereof;

5. No representations or promises of any kind, other than as contained in this Stipulation, have been made by the plaintiff or his attorneys to induce defendant to enter into this Stipulation or to consent to the entry of the Final Judgment.

DATED: October 25, 1978.

WALTER COCHRAN-BOND
A. THOMAS HUNT
TIMOTHY B. FLYNN
Center for Law in the Public Interest
By /s/ Walter Cochran-Bond
WALTER COCHRAN-BOND
Attorneys for Plaintiff

JOHN H. LARSON, County Counsel
WILLIAM F. STEWART, Chief,
Labor Relations Division
ALAN K. TERAKAWA, Deputy
County Counsel
By /s/ Alan K. Terakawa
ALAN K. TERAKAWA
Attorneys for Defendant

APPENDIX D.

Plaintiff's Motion for Reconsideration of Order Dismissing Appeal; Declarations of Charles L. Jordan and Walter Cochran-Bond; Memorandum of Points and Authorities; Proposed Order.

United States Court of Appeals for the Ninth Circuit.

Charles L. Jordan, Plaintiff-Appellant, v. County of Los Angeles, Defendant-Appellee. C.A. No. 79-3112.

U.S. Court of Appeal, Ninth Circuit.

Received: December 3, 1979.

RELEASE

This is a release of all claims, which claims arose by reason of the withhold from certification of CHARLES L. JORDAN from the position of custodian under Rule 7.04 of the Rules of the Civil Service Commission of County of Los Angeles on or about September 19, 1973. It was alleged by the undersigned that the withhold was in violation of his rights under Title VII of the Civil Rights Act of 1964, as amenued in 1972, 42 U.S.C. § 2000e, *et. seq.* and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Specifically, it was alleged that the policy and/or practice of the County of Los Angeles of withholding unsuitable applicants from certification for employment based wholly or in part on the consideration of records of arrest without conviction, convictions of marijuana-related offenses and formal dispositions of offenses as a juvenile which are the equivalent of adult convictions, is racially discriminatory against the undersigned as an individual protected by the foregoing statutes.

For and in consideration of Five Hundred Dollars ($500) as evidenced by Los Angeles County Warrant No. 381027 dated February 21, 1979, payable to CHARLES L. JORDAN and his attorney, WALTER COCHRAN-BOND, re-

ceipt of which is hereby acknowledged, the undersigned, CHARLES L. JORDAN, does hereby agree as follows:

1. That the undersigned, CHARLES L. JORDAN, hereby releases and fully discharges the County of Los Angeles, and any department, office or institution thereof, and any person, firm subdivision, agent or corporation from which the undersigned should at any time in the future demand damages alleged to have been sustained as a result of the above-described incident of withhold from certification for appointment to the position of Custodian on or about September 19, 1973, and any related action taken by the County of Los Angeles from any and all claims, demands, and causes of action that the undersigned now, or in the future, may have for loss of pay or other compensation or benefits of any kind, or other losses or damages whatsoever arising directly or indirectly from said incident, and for consequential damage of every kind and character resulting from said incident, whether said damages be now existent or become existent in the future, whether the same be known or unknown, and whether the same be anticipated or unanticipated.

2. That the payment to the undersigned of the aforementioned sum in settlement of all claims he may have arising out of the above-described incident is not and cannot be deemed an admission of liability of any kind on the part of any party described in the foregoing paragraph 1 on the ground of racial discrimination against him or any of his allegations in support thereof.

3. That the undersigned hereby relinquishes and waives all rights conferred upon him by the provisions of Section 1542 of the Civil Code of the State of California, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his

favor at the time of executing the release, which if known to him must have materially affected a settlement with the debtor."

4. That the undersigned does and will forthwith abandon the prosecution of all causes of action growing out of the incident described in paragraph 1 sued upon or suable upon in any court, or any complaint filed with or with the potential of being filed with any administrative body authorized under law or regulation with or without the force and effect of law, or any other body which could possibly have jurisdiction and could provide a remedy to the undersigned based on said incident, and does and will order any such administrative or other body to terminate all pending proceedings on his behalf.

IN WITNESS THEREOF, the undersigned does hereby execute this Release this _____ day of _____.

/s/
CHARLES L. JORDAN

THE FOREGOING Release is executed in the presence of and under the direction and advice of his attorney.

/s/
WALTER COCHRAN-BOND

APPENDIX E.

Brief of Defendant/Appellee; Declaration.

United States Court of Appeals for the Ninth Circuit.

Charles L. Jordan, Plaintiff-Appellant, v. County of Los Angeles, Defendant-Appellee. C.A. No. 79-3112. D.C. No. 76-1925.

U.S. Court of Appeal, Ninth Circuit.

Appeal from the United States District Court For the Central District of California, The Honorable Lawrence T. Lydick.

DECLARATION OF
HOWARD M. PHILLIPS

The undersigned, HOWARD M. PHILLIPS, declares:

1. I am the Chief, Employment Opportunities Section of the Employee Placement Division of the Department of Personnel of the County of Los Angeles. As such, I am responsible for the operation of the Applicant Records Unit and am aware of and familiar with the policies and procedures which govern its operation. I make this declaration in support of the position of appellee as set forth in its brief submitted in the instant matter.

2. The current Background Checking Program ("Program") of the County of Los Angeles was implemented pursuant to a resolution of the Board of Supervisors of the County of Los Angeles on December 12, 1978, subsequent to a change in State law which had precluded, since January of 1975, the obtaining of criminal offender information by the County except for employees of law enforcement agencies.

3. The operation of the current Program is governed by the procedural manual ("manual") dated March 26, 1979, Exhibit "A" to this declaration and incorporated by ref-

erence herein as if set forth in full hereat. The actual operation of the current Program conforms with the manual.

4. Under current policy, the criminal record of prospective employees is reviewed only for specific positions in specific County departments and/or specific organizational units of departments which have been designated as "sensitive," as defined by the manual and justified as such according to procedures set forth in the manual. Not all County departments and/or organizational units contain positions designated as sensitive and the majority of positions are not so designated.

5. The positions designated as sensitive under the current Program do not include every position for which criminal offender information had been obtained and evaluated under earlier programs.

6. Individual standards for employment for positions designated as sensitive in specific departments and organizational units have been developed under the current Program and govern what types of criminal offender information are relevant and require evaluation in terms of the position in question. Such standards have been developed since implementation of the current Program and are not the same as under previous programs.

7. No criminal record is disqualifying by its mere existence unless the offense is disqualifying for the position in question under law (e.g., potential law enforcement officers must be free of felony convictions under State law.).

8. Arrests without conviction are not considered as disqualifying for any position.

9. The manual and policies contained therein have been reviewed by the Department of Justice of the State of California and been determined to meet the provisions of the California Penal Code governing the obtaining, maintenance

and dissemination of criminal offender information (see Exhibit "B" to this declaration, incorporated by reference herein as if set forth in full hereat.). No such approval was obtained under previous programs.

Executed this 6th day of June, 1980, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Howard M. Phillips
HOWARD M. PHILLIPS

APPENDIX F.

Motion for Leave to Add Parties; Declarations of Walter Cochran-Bond, James Keys, Jr., Tony L. Clarke and Samuel Abrons; Memorandum of Points and Authorities; Proposed Order.

United States Court of Appeals for the Ninth Circuit.

Charles L. Jordan, Plaintiff-Appellant v. County of Los Angeles, Defendant-Appellee. C.A. No. 79-3112.

U.S. Court of Appeal, Ninth Circuit.

Received: April 4, 1980.

DECLARATION OF JAMES KEYS, JR.

The undersigned, JAMES KEYS, JR. declares:

1. I am a member of the class named plaintiff Charles L. Jordan seeks to represent in the above-captioned lawsuit. I make this declaration to inform the Court of facts that show I have a claim as having been denied employment by defendant County of Los Angeles ("County") on the basis of a practice challenged by this lawsuit as being unlawfully discriminatory against blacks.

2. I am a black. In 1974, I applied for a pool attendant position with the County. I received a notice from the County on or about April 23, 1974 stating that I was being withheld from appointment to this job pursuant to Civil Service Commission Rule 7.04(e) as a person "[w]ho has been convicted of a crime."

3. The only criminal record that I had when I applied for employment with the County was a burglary charge that I received in 1967 when I was a juvenile 19 years of age. I had no other criminal record in the almost seven years between this juvenile offense and the date I was denied employment by the County.

4. It is my understanding that this class action lawsuit challenges the County's consideration of juvenile offenses as disproportionately affecting the employment opportunities of black applicants as compared to white applicants. Since I am a black applicant who has been denied employment as a result of my juvenile record, I have been affected by a practice at issue in this lawsuit and I am a member of the class of persons this lawsuit seeks to benefit.

5. I have retained the Center for Law in the Public Interest to serve as my attorneys in this lawsuit. If added as a plaintiff, I intend to represent the interests of the members of the class that sought certification in the trial court and to seek the same class-wide and individual relief that has been sought by Mr. Jordan to date.

Executed this 26th day of March, 1980, at Los Angeles, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ James Keys, Jr.
JAMES KEYS, JR.

DECLARATION OF TONY L. CLARKE

The undersigned TONY L. CLARKE declares:

1. I am a member of the class named plaintiff Charles L. Jordan seeks to represent in the above-captioned lawsuit. I make this declaration to inform the Court of facts that show I have a claim as having been denied employment by defendant County of Los Angeles ("County") on the basis of a practice challenged by this lawsuit as being unlawfully discriminatory against blacks.

2. I am a black. In 1974, I applied for a job as a Security Guard Park Patrol with the County. I received a notice from the County on or about February 25, 1974 stating that I was being withheld from appointment to this job pursuant to Civil Service Commission Rule 7.04(e) as a person "[w]ho has been convicted of a crime."

3. The only criminal record that I had when I applied for employment with the County was a conviction for possession of marijuana which I received on or about October 13, 1973. I had no other criminal record at the time I was denied employment by the County.

4. It is my understanding that this class action lawsuit challenges the County's consideration of convictions of marijuana-related offenses as disproportionately affecting the employment opportunities of black applicants as compared to white applicants. Since I am a black applicant who has been denied employment as a result of my record of a marijuana-related conviction, I have been affected by a practice at issue in this lawsuit and I am a member of the class of persons this lawsuit seeks to benefit.

5. I have retained the Center for Law in the Public Interest to serve as my attorneys in this lawsuit. If added as a plaintiff, I intend to represent the interests of the members of the class that sought certification in the trial court

and to seek the same class-wide and individual relief that has been sought by Mr. Jordan to date.

Executed this 28th day of March, 1980, at Los Angeles, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Tony L. Clarke
TONY L. CLARKE

DECLARATION OF SAMUEL ABRON

The undersigned SAMUEL ABRON declares:

1. I am a member of the class named plaintiff Charles L. Jordan seeks to represent in the above-captioned lawsuit. I make this declaration to inform the Court of facts that show I have a claim as having been denied employment by defendant County of Los Angeles ("County") on the basis of practices challenged by this lawsuit as being unlawfully discriminatory against blacks.

2. I am a black. In 1974, I applied for a number of jobs including firefighter and animal control positions with the County. I received a notice from the County on or about April 23, 1974 stating that I was being withheld from appointment to a County job pursuant to Civil Service Commission Rule 7.04(e) as a person "[w]ho has been convicted of a crime."

3. When I applied for a job with the County, my criminal record included the following: an arrest for suspicion of robbery in 1967 while a juvenile 16 years of age; a juvenile offense for possession of marijuana in 1971 when 19 years of age; a theft conviction in 1972; conviction for possession of marijuana in 1972; and a burglary conviction in 1972.

4. It is my understanding that this class action lawsuit challenges the County's consideration of arrest records, juvenile records and records of marijuana-related offenses as disproportionately affecting the employment opportunities of black applicants as compared to white applicants. Since I am a black applicant who has been denied employment as a result of my criminal record which includes an arrest, juvenile offenses and marijuana-related offenses, I have been affected by the practices at issue in this lawsuit and

I am a member of the class of persons this lawsuit seeks to benefit.

5. I have retained the Center for Law in the Public Interest to serve as my attorneys in this lawsuit. If added as a plaintiff, I intend to represent the interests of the members of the class that sought certification in the trial court and to seek the same class-wide and individual relief that has been sought by Mr. Jordan to date.

Executed this 1st day of April, 1980, at Los Angeles, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Mr. Samuel Abron
SAMUEL ABRON

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1982

Office - Supreme Court, U.S.
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COUNTY OF LOS ANGELES,

Petitioner,

v.

CHARLES L. JORDAN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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June 22, 1982

No. 81-2189

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June 22, 1982

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
SUMMARY OF ARGUMENT		1
ARGUMENT		4
I.	The Ninth Circuit Had A Factual Basis For Finding A "Live Controversy" To Exist	4
II.	The Ninth Circuit Found Respondent To Have A "Personal Stake" In The Lawsuit In His Status As A Current And Future Applicant	10
III.	There Is No Conflict Between The Ninth Circuit's Approach To Rule 23(a) And The Approach Adopted By The Supreme Court And Other Circuits	15
IV.	There Are No Questions Of Fact To Which An "Abuse Of Discretion" Standard Would Be Applicable	17
CONCLUSION		20

TABLE OF AUTHORITIES

Cases	Page
Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)	9
East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977)	15
Gay v. Waiters and Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977)	15, 16
Pullman-Standard v. Swint, ___ U.S. ___, 50 U.S.L.W. 4425 (1982)	3, 17 19
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)	13, 14
United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)	2, 5 6, 8 11, 12 13, 14

Statutes	Page
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*	1, 3, 7, 9, 16

Other Authorities	
Rule 23, Federal Rules of Civil Procedure	3, 15, 16, 17, 19

SUMMARY OF ARGUMENT

I. The Ninth Circuit had a factual basis for determining that a "live controversy" continues to exist. First, the Court of Appeals recognized that Respondent continues to challenge the practices alleged to violate Title VII because the new guidelines adopted by Petitioner while this case was on appeal do not eliminate the practices. Second, individual members of the class are entitled on remand to "make whole" relief for being denied jobs under the previous guidelines.

II. The Ninth Circuit found the "personal stake" requirement to be met because the named plaintiff has a continuing stake, as a current applicant and as a future applicant, to have the challenged practices eliminated. Otherwise, his criminal records will continue to exclude him from employment by Petitioner. The "personal stake" requirement also is satisfied by the named plaintiff's personal stake in the class certification claim. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-404 (1980). Finally, three individuals who have been affected by the challenged practices have sought to intervene.

III. Contrary to Petitioner's assertion, the Ninth Circuit's policy

of considering the remedial purpose of Title VII when assessing a case under Rule 23 of the Federal Rules of Civil Procedure is not in conflict with the requirement that the Rule 23(a) prerequisites be met. In fact, the Circuit Court specifically held that Respondent has made the requisite showing for each prong of Rule 23(a).

IV. The Ninth Circuit did not apply an incorrect standard for review because there were no questions of fact to be resolved. Rather, the class certification issue was litigated solely on stipulated facts. Hence, the recent decision in Pullman-Standard v. Swint, ___ U.S. ___, 50 U.S.L.W. 4425 (1982) has no application to this case.

ARGUMENT

I

The Ninth Circuit Had A Factual Basis For Finding A "Live Controversy" To Exist

The Ninth Circuit dealt at Section II.A. of its opinion with Petitioner's argument, repeated in this Court, that Petitioner's adoption of new guidelines for the consideration of an employment applicant's criminal record while this case was on appeal extinguished any "live controversy" between the plaintiff class and Petitioner. The Ninth Circuit correctly recognized that the following facts indicate a "live controversy" does continue to exist:

(a) Respondent intends to

challenge Petitioner's practices under the new guidelines because Petitioner still will consider an applicant's juvenile and marijuana-related conviction records and the new guidelines merely reiterate the previous arrest record "policy" which was not adhered to in practice, Petitioner's Appendix A, p. 6; and

(b) Members of the putative class, exemplified by several who have sought to intervene, still have "live" claims for "make whole" relief for having been denied employment by the challenged employment practices, Petitioner's Appendix A, p. 5.

Petitioner claims that reliance on these facts by the Ninth Circuit is an "unwarranted expansion" of the holding in United States Parole

Comm'n v. Geraghty, 445 U.S. 388 (1980). Petitioner would have Geraghty stand for the proposition that a "live controversy" exists only where there are members of the class who are being subjected at the time of the appeal to the identical practice or set of guidelines which affected the name plaintiff. While these may have been the facts that established a "live controversy" in Geraghty, the case by no means indicated that this factual pattern was essential for a "live controversy" to exist.

Respondent has two responses to this argument. First, the instant case does fit the factual pattern in Geraghty in that Respondent claims members of the class are still being subjected to the practices challenged

in this lawsuit even though Petitioner has adopted a new set of procedural guidelines. Petitioner would have this Court believe that Respondent brought this lawsuit to challenge a set of guidelines which now have been altered. This is a mischaracterization of Respondent's lawsuit. Respondent has alleged that Petitioner has violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. ("Title VII") by its practice of denying employment to applicants based on certain "soft" criminal records (arrests, juvenile offenses and marijuana-related convictions) which have a disparate impact on blacks and have no demonstrable relationship to later job performance. Even under Petitioner's

"new" guidelines, Petitioner will be continuing its practice of considering these same criminal records in deciding whether or not to deny employment to applicants.[1]

Second, this case has an additional fact establishing a "live controversy" which did not exist in Geraghty: the class members affected by the challenged practice are entitled to individual "make whole" relief as well as an injunction against the practice. The Geraghty

---

[1]Petitioner makes curious references at pages 9 and 10 of the Petition to "undispute evidence in the record" and "absolutely no evidence in the record" when discussing its new procedures. These procedures or guidelines, however, were adopted while this case was on appeal, have been subject to no discovery by Respondent and have not been the subject of an evidentiary hearing. The only evidence in the [Footnote continued on next page.]

case was a constitutional challenge which sought no monetary or other relief for the class members while the instant case is brought pursuant to Title VII under which persons affected by a statutory violation are entitled to be made whole by the employer. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

---

[1] [Continued from previous page.] "record" concerning these new procedures is a self-serving declaration by one of Petitioner's employees. Petitioner's Appendix E.

II

The Ninth Circuit Found Respondent To Have A "Personal Stake" In The Lawsuit In His Status As A Current And Future Applicant

Petitioner bases its argument that Respondent has no "personal stake" in this lawsuit on the claim that Respondent settled all of his claims and abandoned the class after the denial of class certification. This characterization of the settlement is inaccurate.

The Ninth Circuit correctly recognized that Respondent merely settled his claims for "make whole" relief for his denial of employment on September 19, 1973 but specifically retained his interest in appealing the denial of class

certification and in obtaining injunctive relief on behalf of the putative class with respect to the challenged practices. Petitoner's Appendix A, pp. 7-8, n.4. The Ninth Circuit further recognized that Respondent's "personal stake" grew out of his status both as an actual current applicant and as a potential future applicant for employment with Petitioner and hence a person who has continued to be subject to the challenged practices. Petitioner's Appendix A, p. 9.

The Supreme Court in Geraghty did not require even a direct "personal stake" as possessed by Respondent as a current and future applicant. Rather, it was recognized that a name plaintiff in a class action has a "personal stake" in the

class certification claim which is independent of the plaintiff's personal claim on the merits. 445 U.S. at 402-404. Respondent in this case clearly retained this interest in class certification while settling his individual claim by the provision in the Stipulation to Entry of Final Judgment re Individual Claims of Charles L. Jordan which states:

> "WHEREAS, all parties understand that the settlement of Plaintiff Jordan's individual claims will not in any way affect the class action aspects of this case ...."

This intent is further shown by Respondent's decision to settle his case by the entry of a final judgment rather than by a dismissal of the action and by his immediate filing of

a notice of appeal of the denial of class certification.

These facts distinguish the instant case from the case contemplated by the Court at footnote 10 in Geraghty. This footnote expressly leaves open the question "whether a named plaintiff who settles the individual claim after denial of class certification ... may appeal from the adverse ruling on class certification." Respondent submits that there is a major difference between the facts of this case and the case where named plaintiffs settle their individual claims and agree to a dismissal of the action. It is this later situation which was present by the facts in the case referenced in this footnote, United Airlines, Inc. v.

McDonald, 432 U.S. 385, 393-94, and n.14 (1977).

There is one final factual situation presented by the instant case which takes it outside the issues discussed in Geraghty. Here, there are three members of the class who have sought to intervene and to pursue the appeal of the denial of class certification. See Petitioner's Appendix F. These three individuals have a "personal stake" in the outcome of this lawsuit both with respect to their individual claims for make whole relief and with respect to class-wide injunctive relief. Even the dissenter in Ninth Circuit would have remanded the case to allow these class members to intervene.

III

There Is No Conflict Between The Ninth Circuit's Approach To Rule 23(a) And The Approach Adopted By The Supreme Court And Other Circuits

Petitioner argues at Section IV of its Petition that the Ninth Circuit's opinion in Gay v. Waiters and Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977), relied upon by the Circuit Court in the instant case, is in conflict with decisions in other circuits and the Supreme Court's decision in East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977). Petitioner contends that the ruling in Gay that Rule 23 must be interpreted and applied in a way that will not undermine the broad remedial purpose

of Title VII conflicts with the requirement that the Rule 23(a) prerequisites must be met. These are not conflicting principles.

The Ninth Circuit never has held that the Rule 23(a) requirements need not be met. In Gay, the Ninth Circuit held that the district court applied rule 23(a)(1) in an "unduly restrictive manner" but then remanded the case for re-determination of the Rule 23(a) requirements. 549 F.2d at 1334. In the instant case, the Ninth Circuit referred to Rule 23(a) as setting forth "mandatory prerequisites" and quoted Rule 23(a) in full at footnote 6. Petitioner's Appendix A, p. 10. The Circuit Court then went on to deal separately with each subsection of Rule 23(a). Petitioner's Appendix A, pp. 11-20.

Hence, the conflict Petitioner seeks to establish is illusory.

IV

There Are No Questions Of Fact To Which An "Abuse of Discretion" Standard Would Be Applicable

Petitioner's final argument at Section V of its Petition that the Ninth Circuit applied the wrong standard for review has no merit. Petitioner relies on the recent decision in Pullman-Standard v. Swint, ___ U.S. ___, 50 U.S.L.W. 4425 (1982) and argues that an "abuse of discretion" standard should have been applied to factual issues in reviewing the district court's Rule 23 rulings.

Unlike the Pullman-Standard

case, however, the district court's rulings in the instant case are not findings of fact based on a contested factual record. In fact, the motion for class certification below was based upon a Stipulation of Fact Relevant to the Existence of a Class, a Stipulation of Uncontested Facts for Purposes of the Parties' Cross-Motion for Summary Judgment and a declaration of Respondent's counsel. Petitioner's opposition presented absolutely no facts, by declaration or otherwise. Hence, there were no purely factual issues before the district court.

Rather, the Ninth Circuit in this case addressed issues that were mixed questions of law and fact: the only questions were whether the uncontested facts are relevant to a

Rule 23(a) requirement and whether the uncontested facts are sufficient to meet a Rule 23(a) requirement. With respect to such issues, the opinion in Pullman-Standard stated at footnote 19 that:

> We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact -- i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. * * * There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court ...."

CONCLUSION

For the reasons stated above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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